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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 270

SWIFT & COMPANY,
~~NATIONAL BISCUIT COMPANY, and~~
~~THE GREAT ATLANTIC & PACIFIC TEA COMPANY,~~
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF SWIFT & COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

UNITED STATES OF AMERICA,
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PETITION OF SWIFT & COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRAYER FOR WRIT

Petitioner Swift & Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 12, 1958, which rejects an administrative determination of the Secretary of Agriculture on a matter which is basic to the operation of the Department's program for the support of prices paid to producers of milk and butterfat. This is a test case which will govern the outcome of a great many other claims made by the Department of Justice.

OPINIONS BELOW

The opinion of the District Court is reported in 152 F. Supp. 738 and is printed at pp. 612-644 of the Record Appendix filed in the court below and filed in this Court with this Petition. The opinion of the Court of Appeals is not yet officially reported but is printed in Appendix B, pp 20-35, filed herewith.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on June 12, 1958. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Did the court below have power to reverse an administrative determination by the Secretary of Agriculture that certain transactions with Petitioners and more than one hundred other companies involved price support "purchases" where the testimony was *uncontradicted* that this determination was based upon a sound economic judgment? Can the dairy industry continue to rely upon the determinations of the Secretary of Agriculture made under these circumstances, or can the Department of Justice upset such transactions years later and force the companies to refund monies received even though it concedes that both the companies and Agriculture acted in complete good faith, that the companies complied scrupulously with Agriculture's requirements, and that the transactions saved the government a considerable sum of money?

STATUTES INVOLVED

The statutes involved are the Agricultural Act of 1949, 63 Stat. 1052, 7 U. S. C. 1421 *et seq.*, and the Commodity Credit Corporation Charter Act, 62 Stat. 1070, 15 U. S. C. 714 *et seq.* The pertinent provisions of these statutes are printed in Appendix A, pp. 15-19.

STATEMENT OF THE CASE

In order to avoid duplication Petitioner adopts the Statement of the Case contained in the Petition of National Biscuit Company and The Great Atlantic & Pacific Tea Company.

As stated by Government counsel in their Brief in the Court of Appeals, the basic facts in this case are undisputed. They are accurately summarized in the Opinion of the Court of Appeals (App. B, pp. 21-31). It is evident, therefore, that Petitioner is not seeking to have this Court review the facts upon which the Court of Appeals based its decision. On the contrary, the only issue is whether the correct principles of administrative law were applied to these facts. This is a matter of great importance to the Department of Agriculture, to the dairy industry, and to these Petitioners.

This case presents the bizarre situation of a wrangle between two coordinate branches of the United States Government which has caught the industry in a cross-fire, through no fault of its own. The Department of Agriculture stoutly maintains that it was authorized to enter into these transactions and that these suits filed by Justice should fail. Its representatives so testified at the trial.

The Court below held that the transactions were illegal because the statute authorized only "purchases" of cheese

and butter by Commodity Credit Corporation (price support "loans" were not used under Da-112). However, this begs the whole question in the case: namely, what kind of transactions did Congress have in mind when it used the word "purchases" in Section 201 of the Agricultural Act of 1949 (7 U. S. C. Sec. 1446(c))?

The Court of Appeals assumed, with no justification whatever, that Congress had authorized only "normal" purchases. Presumably the Court used this adjective to describe the usual type of commercial purchase, for it proceeded to measure these transactions by the technical legal tests which would be applicable to a purchase of goods for use. *But what Congress authorized here was a price support operation, not a procurement operation.* The elements of a price support purchase are peculiar to it and do not necessarily include the usual trappings of a commercial purchase.

The Court below closed its eyes to the fact that the basic test of a price support purchase is its economic effect rather than its legal features. Specifically, a price support purchase must remove the commodities from the market during the relevant period. There is not the slightest indication in the Opinion of the Court of Appeals that is understood this fundamental characteristic, for it discussed (App. B, p. 32) only such technical legal considerations as change of possession, risk of loss, etc. (which might indeed be relevant to a purchase of shares of stock, for example).

The Court of Appeals completely disregarded the best available definition of the word "purchases" as used in the statute. This is contained in the Opinion of the Comptroller General of the United States which gave rise to these suits and which the Department of Justice is here supporting (Supplemental Record Appendix, p. 655):

"While the purchase method of supporting prices for dairy products with which we are concerned involves many complicated considerations, it is clear that 'purchase' means an acquisition, if not of full ownership, of a property interest in the commodity which, at the very least, would permit its complete removal from the market."

The fundamental conflict here is between the Comptroller General's conclusion that the Da-112 transactions "did not remove (the butter and cheese) from the market" (Supp. R. A. 657) and the Secretary of Agriculture's conclusion that they did (R. A. 68).

The foregoing analysis, based upon the Government's own definition of the statutory word "purchases", should make it apparent that we are here confronted with an attempt by the Department of Justice to substitute its judgment for that of the Secretary of Agriculture on a matter of agricultural economics. This is contrary to every principle of administrative law as repeatedly enunciated by this Court.

REASONS FOR GRANTING THE WRIT

I. *The decision of the Court of Appeals is in Conflict With Decisions of This Court Prescribing the Limits Of Judicial Review of Administrative Determinations.*

The rule of law applicable in a case as this has been succinctly stated by Mr. Justice Frankfurter, speaking for the Court in *Secretary of Agriculture v. Central Roig Refining Company*, 338 U. S. 604 (1950) at 606:

"It is not our right to pronounce economic views; we are confined to passing on the right of the Congress and the Secretary to act on the basis of entertainable economic judgments."

This is a peculiarly apt illustration of the general proposition that an administrative determination cannot be set aside because the reviewing Court might have decided differently were it empowered to do so. *Securities & Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 94 (1943); *Gray v. Powell*, 314 U. S. 402, 412 (1941). As this Court stated in *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 513 (1944):

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The decisions below are in direct conflict with this rule. *The Secretary of Agriculture's determination was not only supported by evidence; it was supported by all the evidence in the case.* There simply was no testimony to the contrary adduced by the Department of Justice. It put on only one witness, an official of the Department of Agriculture who was a trained economist active in the formulation of Da-112. He completely refuted Justice's theory of the case, stating that in his opinion the transactions in question removed the commodities from the market and thus helped to carry out the statutory objective of supporting the price of milk to the farmer (R. A. 61-62; 68).

Testifying for Petitioners, another Agriculture representative said that these purchases gave agriculture all that it wanted or needed in order to carry out the statutory requirement of price support, namely, removal of the commodities from the market for the remainder of the marketing year (R. A. 139). (The Courts below seemed unable to comprehend that the Department was not purchasing the cheese and butter for the purpose of stockpiling it, or reselling it, or consuming it.)

In addition to their experienced operating personnel Petitioners also produced as witnesses two agricultural economists, both of whom supported the Secretary's determination in every respect. (One of these, Dr. John D. Black, of Harvard, is probably the world's leading expert in this field.) It was their "economic judgment" that the Da-112 purchases had the effect of removing the cheese and butter from the market, thereby helping to accomplish the statutory purposes of supporting milk prices until the end of the marketing year (R. A. 186; 338).

No explanation has ever been offered by Government counsel as to why they failed to produce any testimony in support of their own amateur economic opinions. In any event, the uncontradicted evidence of the professional economists supports the Secretary's determination that Da-112 involved bona fide "purchases" as that term was defined by the Comptroller General.

As the official charged with the administration of the statute, the Secretary's interpretation of it is entitled to the greatest weight. *Billings v. Truesdell*, 321 U. S. 542, 552 (1944); *United States v. Jackson*, 280 U. S. 183, 193 (1930); *United States v. Moore*, 95 U. S. 760, 763 (1878). When supported by substantial evidence, his determination is conclusive. See cases cited, *supra* pp. 5-6. The decision of the Court of Appeals flies in the teeth of both these principles.

More specifically, the decision below is in direct conflict with *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111 (1944). There is no necessity to repeat here the discussion of that case, and the quotations from this Court's Opinion, contained in the Petition of National Biscuit Company and The Great Atlantic & Pacific Tea Company at pages 13-15. That the Court of Ap-

peals was concerned about the obvious similarity between the two cases is obvious from its strained attempt to distinguish them (App. B, p. 34). First it states that the facts were different. Of course the facts were different; but the legal principles were the same. It then attempts to draw a distinction on the ground that the Agricultural Act of 1949 confined the Secretary to purchases and loans as the only permissible methods of price support. This perfectly obvious fact contributes nothing to an analysis of either the case at bar or the *Hearst* case; the real question here is whether the Da-112 transactions *were* "purchases", i.e., whether they removed the commodities from the market as required in the Comptroller General's definition.

The *Hearst* case stands for the following propositions, all of which are applicable here and none of which was applied by the Court of Appeals: (1) A reviewing court cannot substitute its own determination for that of an administrative agency which has "support in the record"; (2) where the question is one of specific application (by Da-112) of a particular statutory term ("purchases") in a proceeding in which the agency administering the statute (Department of Agriculture) must determine it initially, "the reviewing court's function is limited"; (3) the "technical legal classification" of even a familiar concept (a purchase) is not controlling where the "economic facts" require a contrary result in order to accomplish the statutory objective.

The Courts below apparently could not believe that in using the words "loans on, or purchases of" Congress had in mind anything but normal commercial transactions. Actually the word "purchases" was used in the specialized sense of the "purchase method" of price supports in con-

tradistinction to the "payment method". According to Petitioners' expert Dr. John D. Black, the "purchase method" is a well recognized concept in the field of agricultural economics (R. A. 349). This term is well known to Congress and has been discussed in *Study of Alternative Methods for Controlling Farm Milk Production and Supporting Prices to Farmers for Milk and Butterfat*, House Document No. 57, 84th Congress (Jan. 5, 1955), Plt'f's Ex. No. 48. That "purchases" did not refer to the usual type of commercial transaction is clear when it is realized that "loan" did not have the usual meaning either (Plt'f's Ex. No. 48, p. 47). A price support loan involves no personal liability on the part of the borrower, and is thus as different from a commercial loan as black is from white.

In the language of the *Hearst* case the applicability of the statute "is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." 322 U. S. at 129. We submit that the Court of Appeals' failure to apply these principles of statutory construction and administrative law requires a review of the case by this Court.

II. *This Case Involves a Matter of Great Interest and Importance to the Dairy Industry and to the Department of Agriculture.*

This suit presents no isolated situation. Under Da-112 there were purchases of 85,531,425 pounds of cheese from 103 different concerns and purchases of 5,227,585 pounds of butter from 45 concerns. The Department of Justice has made demands upon all of these companies for refunds totalling $2,377,332.25. Test cases were instituted in Maryland against the three Petitioners. There have also been cases in Wisconsin and Minnesota involving seven other

companies in which two District Courts have rendered decisions in favor of the Department of Justice. However, the companies which have not yet been involved in litigation may not be bound by these decisions. An authoritative ruling by this Court is imperative.

The public importance of this problem, however, transcends the immediate financial interest of the companies which engaged in transactions under Da-112. The entire dairy industry — from the producer of milk to the retailer of cheese and butter — is vitally concerned with the principle at stake: To what extent can they rely upon the Secretary of Agriculture's representations that he is authorized to purchase their cheese and butter under circumstances such as this?

Consider the dilemma of a manufacturer, like Petitioner Swift & Company. It buys milk and butterfat direct from the farmer and is therefore a key instrumentality of the Department of Agriculture in carrying out the price support program. Swift then manufactures it into cheese and butter. The Agriculture Act of 1949 encourages it to carry large inventories of these commodities by permitting it to sell to Commodity Credit Corporation its surplus over commercial needs. The statute has thus become an important factor in the day-to-day conduct of Swift's business. In fact, Swift has been selling to and buying from CCC since the law went into effect (R. A. 240). If companies such as Swift cannot rely upon Agriculture's authority to consummate these transactions, and if they are to be called upon years later to disgorge monies received from CCC, they cannot long afford to carry the inventories which are necessary for the development of commercial markets as contemplated by the Act. All of the witnesses agreed on this (R. A. 85; 137; 197-202; 224-5, 408; 421; 432).

More specifically, the industry is entitled to know authoritatively whether the statute limits the Secretary to the usual commercial type of purchase. Situations will again arise where he may determine that milk prices will best be supported by a transaction which, like Da-112, is on its face a purchase but which is not in all respects normal. In fact, the very situation which in 1954 gave rise to Da-112 was duplicated in 1958 when support prices were again substantially reduced. In view of the current uncertainty as to the limits of the Secretary's authority, the industry was unwilling to participate in any remedial program resembling Da-112, even though it would have served to support prices.

The Agriculture Act of 1949 is still in effect and the Secretary is still faced with the problem of knowing the limits of his authority. Prior to the institution of these suits he and the industry had assumed that they were protected by very specific statutory language giving him broad discretion in making determinations (App. A, pp. 15-16):

> Sec. 401(b) (7 U.S.C. Sec. 1421(b)): "* * * the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary * * *."
>
> Sec. 412 (7 U.S.C. Sec. 1429): "Determinations made by the Secretary under this Act shall be final and conclusive * * *."

On their face these statutory provisions appear to be a complete answer to the contentions of the Court of Appeals. If, however, they do not mean what they say — that is, if the Secretary can be second-guessed every time he determines that a transaction, which is on its face a purchase, will give Agriculture all of the property interest it needs in order to remove the commodity from the market

and thus support prices — then the Secretary is entitled to have these provisions explained to him by the highest authority.

It is stipulated that Petitioners complied scrupulously with the requirements of Da-112 (R. A. 595), which had been authorized by the Secretary of Agriculture and approved by all levels of his experienced legal staff (R. A. 106.) The good faith of all concerned has been conceded by Government counsel (R. A. 57; 597). It is likewise conceded that Da-112 saved the United States a considerable sum of money (App. B, pp. 34-35). According to the uncontradicted testimony these transactions had the same effect as so-called "normal" purchases in accomplishing the statutory objective of supporting prices, and the Court of Appeals did not find to the contrary (App. B, p. 32).

It is apparent that these cases involve a matter of great public interest, the policy aspects of which have been considered by a Congressional Committee, and the legal aspects of which should be settled by this Court. As evidenced by the testimony of the Agriculture witnesses, that Department still maintains that Petitioners are right and that the Department of Justice is wrong. Unfortunately, Justice is in control of the case, and Agriculture personnel are now silenced except when responding to subpoenas. Petitioners are therefore in the anomalous position of representing the interests of the Department of Agriculture as well as the interests of the industry as a whole and of themselves in particular.

It is obviously impossible for Justice to espouse the views both of the Comptroller General and of Agriculture on the merits of this controversy. *However, we do suggest that in all fairness the Attorney General should at least inform this Court of the Secretary of Agriculture's views with re-*

spect to the importance of the matter to his administration of the Agricultural Act of 1949. While we have not been informed as to what his views are, we suspect that they are similar to those of Dr. Black, who said with respect to the issue in this case (R. A. 306):

"It is not easy to exaggerate the importance of this."

CONCLUSION

The conflict of the decision below with prior decisions of this Court, and the importance of this subject to the dairy industry and to the Department of Agriculture, present a compelling case for the granting of the writ.

Respectfully submitted,

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APPENDIX A

AGRICULTURAL ACT OF 1949

The pertinent parts of the Agricultural Act of 1949 (63 Stat. 1052, 7 U.S.C. 1421 *et seq.*) are as follows:

Sec. 1421 (Sec. 401 of Act). *Source of Price Support; Authority of Secretary; Factors Considered; Compliance by Producer; Time of Determining Levels.*

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. . . .

* * * * * *

Sec. 1426 (Sec. 406 of Act). *Advance Announcement of Price Support Levels; Variation of Levels.*

The Secretary shall, insofar as practicable, announce the level of price support for . . . agricultural commodities in advance of the beginning of the marketing year . . . the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

Sec. 1427 (Sec. 407 of Act). *Sale of Farm Commodities; Policies and Rates of Sale; Exceptions.*

The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section. [The section then sets forth certain restrictions on the sale of "basic" and "storable nonbasic" agricultural commodities] . . . .

Sec. 1428 (Sec. 408 of Act). *Definitions.*

For the purposes of this Act—

(a) A commodity shall be considered storable upon determination by the Secretary that, in normal trade practice, it is stored for substantial periods of time and that it can be stored under the price-support program without excessive loss through deterioration or spoilage or without excessive cost for storage for such periods as will permit its disposition without substantial impairment of the effectiveness of the price-support program.

* * * * * *

(c) A "basic agricultural commodity" shall mean corn, cotton, peanuts, rice, tobacco, and wheat, respectively.

(d) A "nonbasic agricultural commodity" shall mean any agricultural commodity other than a basic agricultural commodity.

Sec. 1429 (Sec. 412 of Act). *Determinations of Secretary as Final and Conclusive.*

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

* * * * * *

Sec. 1446 (Sec. 201 of Act). *Price Support Levels for Designated Nonbasic Agricultural Commodities.*

The Secretary is authorized and directed to make available (without regard to the provisions of sections 1447-1449 of this title) price support to producers for wool (including mohair), tung nuts, honey, Irish potatoes, *milk, butterfat and the products of milk and butterfat* as follows:

* * * * * *

(c) *The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at*

such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefore as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat. (Italics supplied.)

COMMODITY CREDIT CORPORATION CHARTER ACT

The pertinent parts of the CCC Charter Act (62 Stat. 1070, 15 U.S.C. 714 *et seq.*) are as follows:

Sec. 714 (Sec. 2 of Act). *Creation and Purpose of Corporation.*

For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibres (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities, there is created a body corporate to be known as Commodity Credit Corporation (hereinafter referred to as the "Corporation"), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general direction and control of its Board of Directors.

* * * * * * *

Sec. 714b (Sec. 4 of Act). *General Powers of Corporation.* The Corporation—

* * * * * * *

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. . . .

(j) Shall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid.

(k) Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

(l) May make such loans and advances of its funds as are necessary in the conduct of its business.

* * * * * *

Sec. 714c (Sec. 5 of Act). *Specific Powers of Corporation.*

In the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to the Government Corporation Control Act, the Corporation is authorized to use it general powers only to—

(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations.

(b) Make available materials and facilities required in connection with the production and marketing of agricultural commodities.

(c) Procure agricultural commodities for sale to other Government agencies, foreign governments, and domestic, foreign, or international relief or rehabilitation agencies, and to meet domestic requirements.

(d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities.

(e) Increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.

(f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities.

* * * * * *

Sec. 714g (Sec. 9 of Act). *Board of Directors; Composition: Appointment, Tenure, and Compensation; Interim Board.*

The management of the Corporation shall be vested in a Board of Directors (hereinafter referred to as the "Board"). The Board shall consist of five members. The Secretary of Agricultural, or his nominee, shall be a member of the Board and the remaining members shall be appointed by the President by and with the advice and consent of the Senate. . . .

* * * * * *

Sec. 714h (Sec. 10 of Act). *Executive Staff; Composition: Duties; Appointments.*

Responsibility for the day-to-day conduct of the business of the Corporation shall be vested in a staff of executive officers headed by a chief executive appointed by the Board and responsible to the Board.

* * * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7579.

Swift & Company,
National Biscuit Company, and
The Great Atlantic & Pacific Tea Company,
Appellants and
Cross-Appellees,

Versus

United States of America,
Appellee and
Cross-Appellant.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Reargued April 25, 1958. Decided June 12, 1958)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

David R. Owen (Semmes, Bowen & Semmes on brief) for Appellant and Cross-Appellee, Swift & Company; William L. Marbury and John Martin Jones, Jr., (William E. MacKay, Walter S. Halliday, Jr., and Fred E. Campbell on brief) for National Biscuit Company and The Great Atlantic & Pacific Tea Company, Appellants

and Cross-Appellees; George Cochran Doub, Assistant Attorney General, and Marvin C. Taylor, Special Litigation Counsel, Department of Justice, (Leon H. A. Pierson, United States Attorney, on brief) for United States of America, Appellee and Cross-Appellant; and M. R. Garstang on brief for the National Milk Producers Federation, as *amicus curiae*.

SOPER, Circuit Judge:

The United States in these suits seeks to recover substantial sums of money paid by the Department of Agriculture, acting through the Commodity Credit Corporation, to Swift & Company, National Biscuit Company and The Great Atlantic and Pacific Tea Company under a program for price support of milk, butterfats and the products of such commodities in March and April, 1954. In all, payments amounting to approximately $2 million were made to 132 corporations. The payments were made and accepted in good faith in the belief of the parties that the Secretary was acting in accordance with the Agricultural Act of October 31, 1949, 63 Stat. 1051, 7 U.S.C. §1421 et seq., and particularly with §201, 7 U.S.C. §1446(c), which establishes price support levels for dairy products in the following terms:

> "(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat."

The crucial question is whether the transactions involved constituted purchases of the products of milk and butterfat. The Secretary concluded that the transactions were purchases within the meaning of the statute, but subsequently they were examined by the Fountain Committee, a sub-

Committee of the House Committee on Government Operations, 84th Congress, 2nd Session, and an opinion was sought from the Comptroller of the United States. He ruled that the transactions were not purchases and that the payments were unauthorized and improper. Accordingly the present suits were instituted. The District Judge reached the same conclusion and entered judgments for the United States against Swift & Company in the sum of $28,373.84; against National Biscuit Company for $108,693.78; and against The Great Atlantic and Pacific Tea Company for $109,572.55. The defendants have appealed from these judgments. The District Judge refused to add interest to the amounts which he found to be owing by the defendants and the United States has filed a cross-appeal from this ruling.

The transactions took place in March and April, 1954, but they will be better understood from a consideration of the following outline of prior transactions, undertaken by the Secretary of Agriculture to carry out the provisions of the Act, which were designed to afford price support to the producers of various agricultural commodities including milk and butterfat and the products thereof. During the course of the years two distinctive methods for increasing the income of dairy farmers have been evolved. One of these programs is designed to increase the market price of the supported commodity by limiting the supply. Under this method the Government makes a standing offer to purchase, and actually purchases, all quantities of the commodity offered at a pre-determined support price, and thereby so much of the supply as cannot be sold at the desired price level will be removed from the open market and the price level well be maintained.

The other method lets the market price fall through the sale of an unrestricted supply of farming commodities but assures a reasonable return to the farmer by giving him a direct subsidy payment. The amount of the payment is determined by calculating the difference between the free market price he receives for his products and the price the Department of Agriculture determines he should receive

so as to enable him to earn a profit. The basic economic difference between the two programs is that the former is designed to keep the market price up to the desired level through Government acquisition, while the latter lets the market seek its own level and supplements the farmer's income by direct payments.

Both of these methods have been tried under the authority of acts of Congress. The Agricultural Adjustment Act of 1938, 52 Stat. 31, 43, provided limited guarantees of prices ranging from 52 to 75 per cent of parity with those prevailing in the base period between 1910 and 1914. The Commodity Credit Corporation was the agency through which financial assistance was extended. The Steagall Amendment to the statute, passed in 1941, authorized the Secretary of Agriculture to support the price of nonbasic agricultural commodities such as milk at 85 per cent and later at 90 per cent of parity "through a commodity loan, purchase or other operation"; and a program was set up which provided for the purchase by CCC of cheese at one price without physical delivery and the immediate resale at a lower price. During the Second World War both direct payment and sale-and-resale at a loss programs were used in aid of the farming industry. The effect of these programs was to furnish an abnormally low market price to consumers; but when the programs were first restricted and finally abolished by Congress near the end of the war and prices consequently rose, resentment against the farmers was aroused and substantial harm to the market for dairy products ensued. It was under these circumstances that Congress passed the Agricultural Act of 1948 (62 Stat. 1247). It provided in Title I a temporary program under which the Secretary was directed to support the price of agricultural commodities, including the dairy products, by means of "loans, purchases and other operations." This was to continue until December 31, 1949, when a permanent farm program, set up by Title II, was to become effective. Therein price support was authorized by "loans, purchases, payments and other operations."

In the meantime, Secretary of Agriculture Brannon, who was then in office, proposed a plan which involved the maintenance of farm income by direct payment to farmers and permitted the sale of farm products in a free market. Congressional hearings were held on this subject during which the Secretary stated that Title II of the Act of 1948 was, in his opinion, broad enough to permit direct payment to farmers. So much opposition developed to the plan, however, that it was speedily abandoned and Congress repealed Title II of the Act of 1948 and passed the Agricultural Act of 1949.

General provisions contained in subchapter I of this statute define the power and authority of the Secretary of Agriculture in providing the price support authorized or required by the Act. The Secretary is directed by §401 of the Act, 7 U.S.C. § 1421, to provide the price support through CCC. Section 407, 7 U.S.C. §1427, provides that the corporation may sell any farm commodity at any price not prohibited by the section. Basic agricultural commodities and storable nonbasic commodities may not be sold at less than 5 per cent above the current support price; but no restrictions as to price are placed upon nonstorable or nonbasic commodities such as milk, butterfat and the products thereof. Section 406, 7 U.S.C. §1426, directs the Secretary, in so far as is practicable, to announce the level of price support for agricultural commodities other than field crops, in advance of the beginning of the marketing year or season, and the level of price supports so announced cannot be reduced during the year. Section 412, 7 U.S.C. § 1429, provides that determinations made by the Secretary under the statute are final and conclusive, provided that they are not inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

The specific provision for the support of the prices of milk, butterfat and the products of these commodities is set out in §201, 7 U.S.C. §1446(c), set out above, which provides that the price level shall not be in excess of 90 per centum or less than 75 per centum of the parity price

and that price support shall be provided through "loans on or purchase of" the products of milk and butterfat.

Under this statute a series of annual diary price support programs, each to take effect on April 1st for the period of one year, were formulated and announced. The program for the year 1953-54 may be taken as typical, since it was similar in all essentials to those which prevailed in prior years. The Secretary announced on February 27, 1953, that milk and butterfat would be supported at 90 per centum of parity for the marketing year beginning April 1, 1953, and the announcement was followed by the publication, on March 12, 1953, of the 1953-54 price support document which outlined the basic policies to be followed by CCC in the ensuing marketing year. It was announced that butter, cheese and nonfat dry milk solids would be purchased as products of milk and butterfat in carload lots, and that with respect to cheese the style that would be purchased was limited to Grade A Cheddar of large size; and that during the year CCC would purchase, at prices fixed in the document, all quantities of dairy products without regard to the identity of the seller or the source, age or market value of the cheese. The purchase price of cheddar was fixed at 37 cents per pound and the purchase price of butter at 65¾ cents per pound, which were estimated to produce prices for the dairy products representing 90 per centum of parity. Dairy products acquired were to be sold at such prices above the purchase price as the President might approve which would not discourage manufacturers, processors or dealers from carrying normal inventories. Subsequent press releases established a resale price at a standard mark-up of 2 cents per pound for cheese and 3 cents per pound for butter above the support purchase price in effect at the time of the resale. These markups were identical with those previously establised in prior years.

Detailed procedures for carrying out the policies were also covered by announcements, which included Da-99 and Da-100 pertaining to the sale of butter and cheese to CCC, respectively, and Da-107 pertaining to the resale

of these commodities by CCC. Da-100 was a standing offer by CCC to purchase at 37 cents a pound all the cheese offered which met the specifications and provisions were made for the inspection and grading of the product. Offers were subject to acceptance within two days and after acceptance delivery instructions were to be made within seven days, after which an additional seven days were allowed to seller for delivery. Da-99 contains similar provisions in regard to the purchase of butter. Da-107 contained the instructions for the purchase from CCC of specific lots of dairy products at the sale price in effect at the time. In the case of cheese, the product was sold on the basis of the grading certificate covering it when it was purchased and the purchaser was required after acceptance of his offer to furnish a certified check within two days, and delivery to the purchaser at the Government warehouse was to be made within two days after payment. Title to the product was to pass to the purchaser when the product was removed from the warehouse or at the end of six business days after the notice to deliver, whichever first happened. The evidence showed that any person who sold cheese to CCC could subsequently repurchase the same cheese if it was then still available. The products were stored at Government expense until they could be given away or resold, usually at a loss.

The price support program for the year 1953-54 resulted in an increased production of milk and large quantities of butter, cheddar cheese and nonfat dry milk solids so that great quantities of these articles were accumulated notwithstanding every effort to dispose of them. Accordingly, on February 15, 1954, the Secretary announced that for the ensuing marketing year the prices of milk and butterfat would be fixed at 75 per cent of parity, and on February 18 that the support price for butter would be 57½ cents per pound and for cheese 32¼ cents per pound during the marketing year April 1, 1954 to March 31, 1955.

The production of milk and butterfat during the 1953-54 year was well known and the announcement of the

Secretary had been anticipated. The results of the change of policy were important. Prices paid to the farmers dropped suddenly and producers of cheese shifted from small-styles into large-styles which could be sold to CCC under the program of the current marketing year. Cheese, however, could not be sold to CCC until it was ten days old and had been graded. Consequently the prices that would be paid by the manufacturers to the farmers after March 15, would naturally seek the level of the prices which would take effect after April 1. Moreover, it was to the interest of all holders of cheese and butter to sell their holdings to CCC prior to April 1, with the prospect of replenishing their stocks on the open market under the lower price levels that would prevail after April 1. It was even possible for the producers to arrange to repurchase identical lots after April 1.

Some difficulty stood in the way of those who desired to follow this course of conduct in the latter part of February. The requirements for grading cheese prior to purchase by CCC could not be met under the established practice before the end of March, but if the inspection requirements were relaxed it would be possible for a processor to sell his cheese to CCC at 37 cents a pound up until the end of March and later to repurchase the same or similar cheese on or after April 1st at the announced selling price of 34¼ cents a pound for the year 1954-55. Similar arrangements would be made for the sale and repurchase of butter. These transactions required the processors to furnish certified checks so that their money was tied up for considerable periods, and in the case of cheese the further expenditure of 1½ cents a pound for packaging was involved. Notwithstanding these drawbacks, it was to the interest of the manufacturers to sell their product at the March price and repurchase it at the April price. If they did so, the Government surplus would be largely increased and the adequacy of the processors' inventories to meet the demand of the public would be jeopardized.

These circumstances led the Secretary to adopt a special program applicable to March and April 1954, which gave

rise to the transactions that are attacked in these suits. The Secretary issued a press release on March 4, 1954, which was followed on March 9, 1954, by announcement Da-112. Thereby the Secretary gave notice that for the remainder of the month of March CCC was prepared to purchase butter, cheese and nonfat dry milk solids under the 1953-54 program and to resell these commodities to the offerers at CCC domestic sales prices in effect during April. The offer to sell and repurchase was required to be submitted and accepted prior to the close of business on March 31. In each instance the transaction included an agreement on the part of the producer to repurchase the commodity in the case of butter on April 1, and in the case of cheese on April 1 or on the date of inspection, whichever was later.

The effect of such a transaction was, in the case of cheese, that the processor would sell its cheese to CCC at 37 cents per pound, the purchase price which had been fixed under the 1953-54 program, and would immediately repurchase the same for 34¼ cents per pound, the sales price fixed by the Secretary for the 1954-55 program. Certain procedures were outlined in announcement Da-112 in order to make these transactions feasible. The requirement as to inspection and grading of the cheese was relaxed so that it could be accomplished not later than April 30, after the offer to sell had been accepted instead of before acceptance as was the standard practice. Similarly the requirements for packaging and marketing the products in the case of cheese were relaxed.

Provisions relating to the delivery of the commodities and the passage of title were contained in the following provisions:

"9. Delivery:

"*Butter*: Butter offered under the terms of this announcement must have been graded before offered and must have been graded not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded, and at

the time the offer is accepted subject to quality requirements set forth herein as later evidenced by certificates issued by USDA.

"*Cheese*: Cheese offered under this announcement must be in existence, dated, and owned or under consignment to offerer not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later, subject to its meeting the quality requirements set forth herein, as later evidenced by certificates issued by USDA which may be dated after March 31, but not later than April 30, 1954.

* * * * * *

"The offerer, at his expense, shall hold for CCC at the location at which it is graded or sampled in case of milk, and delivered, the commodity which he has delivered to CCC from the time of delivery until CCC redelivers the commodity to the offerer. Failure of the offerer to hold the commodity for CCC until its redelivery to the offerer shall render the contract void."

Under these provisions there was no transfer of the custody of the products, which remained in the possession of the processors.

Certain provisions or options were given to the processors in order to encourage them to enter into the transaction of sale and repurchase. It was provided that if the CCC sale price in effect in April should be greater than the March 31 support purchase price, CCC would, at the offerer's request, relieve the seller of his liability to repurchase and to provide for its sale to CCC under announcements Da-99 and 100, which were standard in the 1953-54 year. The second option provided that under the same circumstances CCC would, at the offerer's request, render the contract void. These provisions were inserted to protect the processor in the event of the passage

of certain bills pending in Congress which would have required the Secretary to establish the price level of farm products at 100 per cent of parity.

In practical effect, the offerer also had the option to cancel the contract to sell the goods to CCC and to sell them elsewhere. Paragraph 9, quoted above, provides that failure of the offerer to hold the commodities for CCC until redelivery renders the contract void. The apparent breach of contract in such a case did not form the basis for any substantial cause of action against the offerer because it would occasion no damage to CCC but would actually result in a saving of money.

The transactions were further faciliated by the provision that settlement for the commodities purchased and resold should be merely on the basis of vouchers submitted by the offerer claiming the net difference between the sales price and repurchase price. The payment of this difference by CCC was the only money that passed hands in the course of the transactions.

On March 23, 1954, the dairy price support program was modified by making it applicable to so-called small-style cheeses. These had been excluded from the standard program and also from the program of Da-112, and in view of unfavorable conditions the manufacture of these styles had practically stopped. This was an unfortunate development since these cheeses were the most readily salable so they were included by the amendment in Da-112 and also in the program for the year 1954-55.

The practical effect of the program was that 132 contracts were entered into under Da-112 for the sale of 5 million pounds of butter and 86 million pounds of cheese and all of the contracts for the purchase of butter and all except six of the contracts for the purchase of cheese involving 252,683 pounds, were actually performed and payments were made by the Government. The economic effect of these transactions was described in the testimony of officials of the Department of Agriculture and of expert

witnesses who testified on behalf of the defendants. In their opinion the transactions (1) helped to support the price paid to dairy farmers for milk and butterfat during the month of March; (2) tended to assure the effectiveness of support activities during the ensuing year and to minimize the expense thereof; (3) promoted the orderly distribution of dairy products and the commercial consumption thereof; (4) saved the Government money and prevented useless expenditures by the butter and cheese industry.

The area of controversy is centered upon the meaning to be given to the direction of Congress that the Secretary, in performing the duty to support the price level of the products of milk and butterfat, must confine himself to loans on or purchase of the products. The controversy is narrowed in this instance to the meaning of the word "purchases", since loans were not attempted. In general terms, the position of the Government is that the word is to be given its normal meaning because there is nothing in the Act to indicate that a special meaning was intended and, more particularly, because the legislative history shows beyond dispute that Congress intended to forbid the Secretary to support the predetermined price level by direct payments or subsidies or "any other operations" than loans or purchases. Since the transactions undertaken by the Secretary under Da-112 did not constitute purchases in any realistic sense, they were not authorized by the statute and the payments made to the defendants must be returned. In addition, it is contended, for a number of reasons, that the transactions under Da-112 did not tend to effectuate the purpose of the statute to support the prices of dairy products in order to assure an adequate supply.

The defendants take a broader view of the meaning of the Act. They say that Congress omitted from the Act provisions empowering the Secretary to make "payments" or to engage "in other operations" to support prices, only to prohibit such operations as might tend to lower the market prices paid for the products, and that "there is nothing whatsoever to indicate that Congress intended to

prohibit any transactions which would support the price of cheese and butter." Hence the transactions under Da-112 were in conformity with the law, because on their face they purported to be purchases involving the transfer of title to specific commodities at a specified time for a specified consideration, and also because the economic effect of the transactions in keeping up the level of prices was the same as any ordinary purchase of products. In any event, it is said that the matter is not open to question in the courts since the Secretary properly determined that the transactions were purchases which would accomplish the purposes of the statute, and his determinations are made final and conclusive by § 412 of the statute, 7 U.S.C. § 1429.

It is our view that the Government's position is correct and we reach this conclusion irrespective of the effect that the Da-112 transactions may have had upon the price level of dairy products or the maintenance of the processors' inventories. The so-called sales of cheese and butter by the processors were not purchases by CCC in any normal sense of the word. The products never left the possession of the processors or came into the hands of the United States and were never intended to do so. In short, the products never moved and there was no delivery or intention to deliver. Storage, handling and transportation charges connected with the sale or resale were "for the account of the offerer" (processor), and the offerer assumed all risk of loss. The Government through CCC obtained no right to sell the goods to other parties but was obliged to resell them at a loss to the processor. On the other hand, the processor not only retained physical possession of the products but full power to disregard his contract to sell and repurchase and to dispose of or sell them to anyone he pleased without incurring any liability to the Government. CCC did not pay for the products which it purposed to buy and the processors did not pay for the products which they purported to buy back. Both transactions were settled by one check of the CCC for the loss incurred in the transaction, which it agreed in advance to assume.

In view of these established facts, the reference in paragraph 9 of Da-112, quoted above, to the delivery of butter and cheese and the transfer of title to the products, back and forth, had no actual significance. The transactions were correctly characterized in the testimony of the Chief of the Dairy Division of the Department of Agriculture before the Fountain Committee of Congress. He said that delivery and transfer of title under Da-112 was really just a paper transaction, which ended up with the Government owing the cheese manufacturer 2¾ cents a pound on all the cheese on which he had submitted claims; that instead of the Government buying the cheese from the manufacturer and the manufacturer then buying it back, what actually happened was that CCC sent the manufacturer a check for the 2¾ cents difference.

The Department of Agriculture has itself recognized that a sale and simultaneous repurchase of products at a loss does not involve a genuine purchase and sale. In a series of opinions by the Solicitor to the Secretary of the Department of Agriculture, which were supported by opinions of the Attorney General of the United States, it was pointed out that the Secretary was not authorized by the statute to support the price of dairy products by direct payments but only by loans and purchases, and it was specifically stated in the opinion by the Solicitor on October 15, 1954, that a purchase of commodities from a processor and the simultaneous sale back at a lower price "would constitute a mere device for the purpose of accomplishing by indirection what could not be accomplished directly."*

The defendants contend that these opinions have no bearing on the question before the court because they were not directed to the programs of price control promul-

* See the opinions of the Solicitor of the Department of Agriculture, May 7, 1954 and October 13, 1954; the opinions of the Attorney General, June 9, 1954 and December 29, 1954; and the letter of the Secretary to the Speaker of the House of Representatives, January 3, 1955, in which it was said that additional legislation would be needed to authorize a method of payment by the purchase-and-sale at a loss or a "wash sale" plan.

gated by the Secretary under the Act of 1949 but were spoken in condemnation of programs which would not accomplish the removal of surplus commodities from the market but allow them to find their own level in free competition. Even so, it is plain that the Department does not rest its actions on the reality of Da-112 transactions as purchases and sales, but on the ground that the Secretary has the power to follow any course which, in his opinion, will support prices at the desired level. In our judgment this position is untenable in view of the clear intent of Congress to confine the methods of the Secretary to purchases or loans.

There is no parallel between the facts of this case and those in *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, on which the defendants base their contention as to the extent of the Secretary's discretion. In that case the court accepted the conclusion of the Labor Board that newsboys continously and regularly engaged in selling papers are entitled to the protection of the National Labor Relations Act as "employees" of the publishers, who control the buying and selling prices, the markets, supplies and hours of labor, and furnish a substantial part of the equipment. The court held that, in reviewing the ultimate conclusions of the Board, it should not substitute its inference of fact for those of the Board if they are supported by substantial evidence and have a reasonable basis in the law. This decision is not persuasive here since Congress, after giving careful consideration to the matter, denied the Secretary broad discretion as to the methods of price support, and confined him to those specifically ennumerated in the Act.

Differences in opinion have arisen in this case as to the economic effect of Da-112 transactions. It is conceded that the program saved money not only for the processor but also for the Government, but it is insisted, for a number of reasons, that there is no reasonable ground for the view that they tended to support the market prices of the products for the benefit of the dairy industry. We do not enter into this controversy. We ground our opinion on the con-

clusion that it was well within the power of Congress to determine what methods should be employed to solve the economic problems arising in a difficult field and that the mandate of Congress must be obeyed.

The District judge denied interest prior to judgment on the sums received by the defendants on the ground that its allowance would be inequitable under all the circumstances of the case. The Government does not dispute the general rule that in suits for the enforcement of quasi contractual obligations arising from payments of money by mistake, interest is not allowed as a matter of right but depends upon considerations of practical justice and fairness. *Jackson County v. United States*, 308 U. S. 343, 350; *Royal Indemnity Co. v. United States* 313 U.S. 289, 296; *United States v. Bass*, 8 Cr., 215 F. 2d 9. The circumstances of the present controversy fully justify the application of the rule "which comports best with general notions of equity." The defendants entered into the transactions which gave rise to the present suits at the invitation of the United States, in the belief on both sides, that the payments were made in accordance with the governing statutes. Although it now appears that the payments were improperly made, it is conceded that one of the results of the transactions was the saving of a considerable outlay of money on the part of the United States. Furthermore, the department of the Government most concerned insisted for more than two years after the payments were made that the defendants were entitled to retain them, and apparently still holds this view notwithstanding the contrary opinion of the representatives of the Government who prosecute these suits. In view of these facts, it would be inequitable to add interest prior to the date when the judgments were rendered.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 271

~~SWIFT & COMPANY~~,
NATIONAL BISCUIT COMPANY, AND
THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF NATIONAL BISCUIT COMPANY AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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PRAYER FOR WRIT AND NATURE OF CASE

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 12, 1958, which rejects an administrative determination of the Secretary of Agriculture on a matter which is basic to the operation of the Department's program for the support of prices paid to producers of milk and butterfat.

[1] The cases against the present petitioners were consolidated for trial with that against Swift & Company. All three cases were heard in the Court of Appeals upon a single record and that court disposed of the appeals in one opinion and judgment. Swift & Company has filed a separate petition for a writ of certiorari to review that judgment.

The Agricultural Act of 1949 authorizes and directs the Secretary of Agriculture through Commodity Credit Corporation to support the price of dairy products by "loans on, or purchases of, the products of milk and butterfat". In the course of administering the Act, the Secretary determined that certain contracts which passed title to specified dairy products to Commodity Credit Corporation for a specified consideration and which he found would tend to support the price of dairy products, were "purchases" within the meaning of the Act even though the contracts also provided for the repurchase of the goods by the seller without actual physical delivery. The Court of Appeals, while not disputing the finding of the Secretary that the transactions would tend to accomplish the objectives of the statute, held that they were not "real" purchases and were, therefore, unauthorized. Accordingly, it affirmed a judgment of the United States District Court for the District of Maryland requiring petitioners to repay without interest sums previously paid to them by Commodity Credit Corporation pursuant to such contracts.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported in 152 F. Supp. 738 and is printed at pp. 612-644 of the printed Record Appendix filed in the court below and filed with this Court along with this petition. The opinion of the Court of Appeals is not yet officially reported but is printed in Appendix B, *infra*, p. 24 *et seq.*

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on June 12, 1958. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the determination of the official charged with the administration of the Agricultural Act of 1949 that certain transactions are "purchases" as authorized therein can be judicially reversed where—

(1) the transactions passed title to specified dairy products to Commodity Credit Corporation for a specified consideration; and

(2) the uncontradicted evidence in the record conclusively establishes that the transactions had the economic effect intended by the Act; and

(3) the only elements of ordinary commercial purchases which these transactions lacked bear no relation to price support or to any other objective of the Act.

STATUTES INVOLVED

The statutes involved are the Agricultural Act of 1949, 63 Stat. 1052, 7 U.S.C. 1421 *et seq*, and the Commodity Credit Corporation Charter Act, 62 Stat. 1070, 15 U.S.C. 714 *et seq*. The pertinent provisions of these statutes are printed in Appendix A, *infra*, pp. 19-23.

STATEMENT OF THE CASE

After years of study and debate and after having experimented for twenty years with various programs for giving economic aid to the farmer, Congress enacted the Agricultural Act of 1949 (Public Law No. 439, 81st Cong. 1st Sess., 63 Stat. 1052, 7 U.S.C. 1421 *et seq.*). Sec. 401 of that Act (7 U.S.C. 1421) authorizes and directs the Secretary of Agriculture through Commodity Credit Corporation to afford price support to producers of various commodities. Sec. 201 (7 U.S.C. 1446) authorizes and directs the Secretary

to support the price of "milk, butterfat and the products of such commodities" between 75% and 90% of parity by the means of "loans on, or purchases of, the products of milk and butterfat". The Secretary is directed to establish the exact level of support between the stated limits at whatever percent of parity he determines necessary "in order to assure an adequate supply".

The legislative history of the Act leaves no doubt that the purpose of limiting the Secretary's operations, insofar as dairy products are concerned, to loans and purchases was to prevent him from using direct payments or subsidies as a means of price support for these commodities. As the Court of Appeals noted (App. B, *infra*, pp. 26-27), there are two competing methods of affording price support to agricultural commodities. The so-called "purchase method" is accomplished by the publication of a standing offer by Commodity Credit Corporation to purchase all quantities of the supported commodity at a predetermined price. The effect of such an announcement is to put a floor under the market and thus to increase the farmer's income by increasing the market price of his products. Under a subsidy or direct payment method of price support, the farmer is permitted to sell his entire production at whatever price he can get for it on the market, and the difference between the price so received and the desired level of income is made up by a subsidy payment by the Government. The effect of this method is, of course, to drive the market price of the commodity down while supporting the income of the farmer by Governmental subsidies.

While the Agricultural Act of 1949 was under consideration, the then Secretary of Agriculture, Mr. Brannan, proposed what was known as the "Brannan Plan". That plan was a typical subsidy plan designed to support the income of farmers rather than the price of the commodities pro-

duced by them. It was vehemently denounced by the National Cooperative Milk Producers Federation and by leading agricultural economists. The Agricultural Act of 1949 was a complete rejection not only of the Brannan Plan but of all other proposals for aiding the farmer by subsidy programs. It was to make this explicitly clear that congress limited the authority of the Secretary in supporting the prices of dairy products to purchases of, or loans on, such products.

Aside from this limitation, the powers conferred upon the Secretary are very broad. Thus, Section 401(b) of the Act (7 U.S.C. 1421(b)) provides that the "amounts, terms and conditions of price support operations and the extent to which such operations are carried out shall be determined or approved by the Secretary" and Section 412 of the Act (7 U.S.C. 1429) provides that "determinations made by the Secretary under this Act shall be final and conclusive."[2] Section 407 of the Act (7 U.S.C. 1427) authorizes Commodity Credit Corporation to "sell any farm commodity owned or controlled by it at any price not prohibited by this section." No restrictions are placed upon the sale of milk, butterfat or the products thereof.[3]

Acting under these statutes the Secretary published a series of announcements establishing programs for the pur-

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[2] This is subject to the proviso that the scope and nature of such determination should not be inconsistent with the Commodity Credit Corporation Charter Act. The Government does not contend that the Secretary has acted in any way inconsistent with that act.

[3] The act places no restrictions upon the resale of non-storable, non-basic commodities. Section 408 (7 USC 1428) defines "non-basic agricultural commodities" to include milk, butterfat or the products thereof. This section defines a "storable commodity" as a commodity which the Secretary determines to be "storable" under the conditions set forth in the section. The Government does not deny that the Secretary determined that milk, butterfat and the products thereof are "non-storable".

chase of cheese, butter and nonfat dry milk solids and for the resale of these products in the domestic market at a fixed mark-up (2¢ per pound in the case of cheese and 3¢ per pound in the case of butter) above the support purchase price in effect at the time of resale. For the 1953-1954 marketing year (April 1, 1953 — March 31, 1954) the level of price support was established by the Secretary at 90 per cent of parity, resulting in a support purchase price of 65½ cents per pound of butter and 37 cents per pound of cheese. Because of the tremendous surplus stocks acquired by CCC during the 1953-1954 marketing year the Secretary reduced the support level for the ensuing marketing year (beginning on April 1, 1954) to 75 per cent of parity — an action which had the effect of creating an abrupt drop in CCC purchase prices of 8 cents per pound in the case of butter and 4¾ cents per pound in the case of cheese.

As a result of this unprecedented situation, the Department of Agriculture was faced with a number of problems. Prices paid to producers during March 1954 threatened to fall to 75 per cent of parity. Moreover, holders of inventories of cheese and butter had a strong incentive to sell a large part of their holdings to CCC before the price reduction on April 1 and thereafter repurchase what they needed in the open market at lower prices. In fact, it was anticipated that the knowledgeable element of the trade would offer to CCC every pound of cheese and butter that could possibly be spared (even to the extent of selling certain cheeses which had to be repackaged) thus reducing normal flow into the pipelines of distribution and creating a staggering disposal problem for CCC. If for any reason such holders of cheese or butter did not wish to part with their stocks, they could, under long-standing policies and procedures, have repurchased the *identical* goods from CCC in April at a lower price prior to the time that they were

required to make delivery of the goods to CCC under the original sale in March. However, it was realized that certain holders of cheese and butter would not be able to take advantage of this means of minimizing their inventory losses because of ignorance, lack of experienced personnel, lack of credit or the specialized character of their holdings.

In an effort to cope with these anticipated developments, the Department in press releases and announcements issued at various times during March 1954 modified its purchasing procedures "so as to provide more effective price support for dairy farmers manufacturing milk prices during March and to permit orderly commercial distribution of butter, Cheddar cheese and nonfat dry milk solids during the next six weeks". Among these modifications was the decision of the Secretary of Agriculture to permit sellers offering cheese and butter during March to contract immediately to repurchase such offerings during April at the customary margins of two and three cents, respectively, above the April sales price. This decision was implemented by announcement "Da-112" which outlined a procedure for those desiring to enter into such purchase-and-resale agreements and set forth the terms and conditions of the sale and repurchase. (This Announcement is printed in full at pp. 520-530 of the Record Appendix in the Court of Appeals).

Under the procedure thus established, holders of cheese and butter were invited to submit offers to sell to and repurchase from CCC their holdings "subject to the terms of Announcement Da-112". The offers had to be submitted in time for acceptance prior to the close of business on March 31, 1954 and had to state the quantity of the commodity being offered, its grade, the number and description of its containers and the location where it was to be held for

CCC. If the offer was in proper form CCC accepted it subject to inspection by Government graders if the lots offered had not previously been graded by the Government. The contracts further provided that title to the commodity was to pass to CCC "at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later." Title was retransferred to the offerer on April 1 or, if the commodity was inspected after April 1, immediately after inspection, whichever was the later.

Petitioners, relying on the Department's published announcement and because of the representations there made, sold and repurchased certain portions of their inventories of cheese and butter under the Da-112 procedure. They complied fully and in detail with all the requirements of that announcement; they selected cheese and butter which met the Department's specifications; they dated these in accordance with approved practice; they segregated these from remaining inventories and presented them for inspection and grading by the representatives of the Department; and they then held them in storage for CCC during the remainder of the marketing year, *i.e.*, until April 1, 1954 or until inspection and acceptance by the Government, whichever was the later (Stipulation, Record Appendix in Court of Appeals, p. 595 *et seq.*). Having thus complied with all the provisions of the contract of purchase and resale, they ultimately received payment from the Government for the difference between the purchase price which the Department had agreed to pay for all cheese and butter offered to CCC before April 1, 1954 and the price at which CCC had agreed to resell all of its stocks of cheese and butter on and after that date.

Some two years after the Da-112 transactions were fully consummated, the Department of Justice demanded repay-

ment of the sums in question after the Department of Agriculture had refused to make such a demand on the ground that the transactions were fully authorized. Upon the petitioners' refusal to make repayment, the Department of Justice brought the present suits in the District Court to enforce its claim for repayment.

At the trial below, petitioners produced officials of the Department of Agriculture, representatives of the industry and two distinguished agricultural economists who testified as to the economic effect of transactions under Da-112. Their testimony as summarized by the Court of Appeals (App. B, *infra*, p. 35) showed that these transactions "(1) helped to support the price paid to dairy farmers for milk and butterfat during the month of March; (2) tended to assure the effectiveness of support activities during the ensuring year and to minimize the expense thereof; (3) promoted the orderly distribution of dairy products and the commercial consumption thereof; (4) saved the Government money and prevented useless expenditures by the butter and cheese industry." The Government produced no testimony to the contrary. In fact, the only witness produced by the Government, Harlan J. Emery, agreed with the economic judgment of the petitioners' expert witnesses (Record Appendix in Court of Appeals, pp. 50, 57-68, 71-76, 79-80, 84, 91-97).

The Court of Appeals, while not disputing the uncontradicted testimony of the witnesses as to the economic effect of these transactions, held that the Secretary had exceeded his powers under the statute by determining that the Da-112 transactions were "purchases" within the meaning of the Agricultural Act of 1949 and resales expressly permitted thereby. This conclusion was reached "irrespective of the effect that the Da-112 transactions may have had upon the price level of dairy products or the maintenance

of the processors' inventories" (App. B, *infra*, p. 36). Petitioners' contention that the Secretary might reasonably have concluded that these transactions were purchases within the meaning of the statute "because on their face they purported to be purchases involving the transfer of title to specific commodities at a specified time, for a specified consideration and also because the economic effect of the transactions in keeping up the level of prices was the same as any ordinary purchase of products" was rejected on the ground that Congress intended to limit the Secretary to "genuine" purchases and sales whereas these transactions were not purchases by CCC "in any normal sense of the word". The Court found that regardless of their form and economic effect, the transactions under Da-112 "did not constitute purchases in any realistic sense" and were, therefore, not authorized by the statute (App. B, *infra*, pp. 35-36).

REASONS FOR GRANTING THE WRIT

First: This case presents a novel question of wide significance. The proper construction of the Agricultural Act of 1949 is important not only to producers of milk and butterfat throughout the nation but to the entire dairy products industry. In the course of his testimony in this case, Professor John D. Black of Harvard University[4] said:

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[4] Professor Black has been Professor of Economics at Harvard University since 1927, and is presently engaged in advising private industry and the Department of Agriculture as a consulting economist. He is past president of both the American Economics Association and the American Farm Economic Association. He has been consulted by the Government on all major agricultural legislation since 1922 and has testified before Congressional committees on numerous agricultural bills (including the Agricultural Act of 1949). He has served on a great number of boards and committees for the Government, including the following: Chief Economist, Federal Farm Board, 1931-32; Consulting Specialist, Bureau of Agricultural Economics, U. S. Department of Agriculture, 1922; Chairman of the Advisory

"If the court rules that Da-112 is not covered by the law, then Congress needs to amend the Act so that such operations are covered. It is not easy to exaggerate the importance of this. In saying this, I am speaking as an economist who has been giving special attention to marketing of farm and food products, and to the consumption side of this, and most attention of all to the dairy products" (Record Appendix in Court of Appeals, p. 306).

Second: The three petitioners were by no means alone in their participation in the Da-112 transactions. Over 130 different concerns, representing each segment of the dairy industry from farmers' cooperatives to retail users of dairy products, entered into Da-112 transactions covering 86,000,000 pounds of cheese and 5,000,000 pounds of butter, and involving net expenditures by the Government of nearly $2,400,000 (Stipulation, Record Appendix in Court of Appeals, pp. 596-597). In all of these cases, demand has been made by the Government for return of payments made pursuant to these contracts and litigation is either pending or in prospect. A definitive ruling by this Court is needed to avoid the necessity for further litigation and to furnish guidance to the lower courts before whom such suits may now or hereafter be pending.

Third: The administration of the Agricultural Act of 1949 involves questions which are primarily economic. For this reason Congress gave broad powers to the Secretary of Agriculture to determine "the terms and conditions of price support operations", and provided that his determina-

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Committee on Agriculture, Social Science Research Council, 1930-33; Member of Agricultural Research Policy Committee and Mobilization Board, U. S. Department of Agriculture, 1949-53; Consulting Economist War Food Administration, 1953; Consulting Economist to the TVA 1940 to present; Consulting Economist, Foreign Operations Administration, 1954-55; Member of the Advisory Committee on Economics and Marketing, FAO.

tions should be "final and conclusive." We submit that it was for the Secretary and not for the Court of Appeals to decide whether the purchases made by CCC under Da-112 were "genuine" or "realistic". In rejecting the Secretary's determination that they were so, the Court of Appeals has invaded his province. This unwarranted intrusion into the domain of a cabinet officer in a matter affecting the national economy requires the attention and corrective action of this Court. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110; *United States v. Ruzicka*, 329 U.S. 287; see also: *National Labor Rel. Bd. v. Hearst Publications*, 322 U.S. 111; *Gray v. Powell*, 314 U.S. 402; *Federal Trade Commission v. Sewell*, 353 U.S. 969.

Fourth: The Department of Agriculture has consistently maintained *and still does maintain* that the transactions under Da-112 were authorized by the Agricultural Act of 1949 and that they were "purchases" within the meaning of Section 201 of that Act. The Court of Appeals does not appear to have understood this in spite of the clear testimony to that effect of the officials of the Department of Agriculture who appeared at the trial below. The extent of the Court's confusion appears from its reference (App. B. *infra*, p. 37) to certain opinions of the Solicitor of the Department of Agriculture, later concurred in by the Attorney General, holding that the Act did not authorize certain proposed transactions of purchase and resale which admittedly would not have supported the price of the products involved, but would simply have operated as a subsidy to the producer. The Court appears to have overlooked the concession made by counsel for the Government in the trial court that these rulings of the Solicitor of the Department dealt with situations which were quite different from that presented by the present record (Record Appendix in Court of Appeals, pp. 117-118).

The Court of Appeals seems also to have been misled by the partial quotation of testimony given by an official of the Department of Agriculture before a committee of Congress which was investigating the Da-112 transactions. This official accepted full responsibility for the Da-112 transactions and defended them vigorously. His testimony, taken as a whole, shows that he did not regard them as mere "paper transactions" as the Court of Appeals seems to have thought (App. B, *infra*, p. 37) but considered them to be purchases and resales within the meaning of the Act (Record Appendix in Court of Appeals, pp. 409, 414; and see pp. 376, 380-381, 387-389, 392, 397, 403, 414-416, 423, 425-426, 428-429, 431).

The Court's misconstruction of prior administrative interpretations of the statute is bound to create serious confusion and to hamper the Secretary in the future administration of the Act. As the matter now stands, the Secretary must limit his operations under the statute to those purchases which the courts will call "normal", or else proceed at the risk of having his programs struck down and those members of the industry who have cooperated in making them effective subjected to the burden of refund suits.

Fifth: In addition to being a departure from the general principles of administrative law announced by this Court, the decision of the Court of Appeals is in direct conflict with *National Labor Rel. Bd. v. Hearst Publications*, 322 U. S. 111 (1944). There the Board held news boys to be "employees" within the meaning of the National Labor Relations Act, even though it admitted that by standards normally applied to other legal situations news boys were independent contractors. After analyzing the legislative history of the Act and the economic objectives which Congress was seeking to attain, this Court upheld the Board, saying (at pp. 128, 130):

"In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise *with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.*

* * * * * *

"*** Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 77 L. ed. 796, 53 S. Ct. 350; United States v. American Trucking Assoc., 310 U. S. 534, 84 L. ed. 1345, 60 S. Ct. 1059. *But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.* Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 84 L. ed. 732, 60 S. Ct. 544) or that he was injured 'in the course of employment' (Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. ed. 184, 62 S. Ct. 221) and the Federal Communications Commission's determination that one company is under the 'control' of another (Rochester Teleph. Corp. v. United States, 307 U. S. 125, 83 L. ed. 1147, 59 S. Ct. 754), *the Board's determination that specific persons are 'employees' under this Act is to be accepted if it has 'warrant in the record and a reasonable basis in law.'* (Italics supplied.)

We submit that in rejecting the Secretary's economic determination of what constitutes "purchases" within the meaning of the price support statute and in adopting a "normal" meaning which bears no relation to the objectives

of the Act, the Court of Appeals set itself in direct conflict with the *Hearst* case. And the attempt of the Court of Appeals to distinguish the two cases (App. B, *infra*, p. 38) only serves to emphasize this conflict.

Sixth: The decision below clearly misconstrues the statute. The word "purchases" as used in the Agricultural Act of 1949 has a special meaning derived from legislative history and administrative practice. That meaning has been defined by testimony before Congressional committees, by reports of such committees on the Act and its predecessors, by debates on the floor of Congress and by reports made to Congress from time to time by the Secretary of Agriculture. From consideration of all these sources it is apparent that Congress using the word "purchases" intended to authorize transactions of simultaneous sale and resale provided that such transactions tended to support the price of the commodities involved. By disregarding this background, the Court of Appeals has been lead into a misconstruction of the statute which has deprived the Secretary of Agriculture of powers needed to carry out the objectives of Congress.

The basic error of the Court of Appeals is its assumption that in prescribing "loans and purchases" as the method of affording price support to dairy farmers, Congress intended to limit the Secretary to purchases in the "normal sense of the word." Nothing could be further from the fact. The purpose of an ordinary commercial purchase is to acquire the right to resell the product at a profit or physically use it in the course of the buyer's business. In such a transaction transfer of possession and freedom of use after purchase is essential. A price support purchase, on the other hand, has as its *raison d'etre* the economic effect which it tends to produce in the market for the purchased

commodity and not the use made of the product after purchase.

In view of its misunderstanding as to the purpose and function of price support purchases, it is not surprising that the Court of Appeals should be misled by the fact that CCC did not acquire physical possession of the commodities during the time that it had title. But in purchasing commodities under the programs established under the Act, CCC is acquiring goods for which it has no use and of which generally speaking it can dispose only by giving them away. It is not interested in getting physical possession or dominion over the goods but only in seeing that they are removed from market competition for a limited period during which prices are to be supported at a specified level. So long as this is accomplished CCC is glad to (and under normal procedures does frequently) leave the goods in the custody of the seller and stands ready to sell the goods to any one, including the original seller, who will pay the established margin above the support price (Record Appendix in Court of Appeals, Emery, pp. 33-34).

It is, therefore, of no moment that the goods "never left the possession of the processors or came into the hands of the United States and were never intended to do so." Since the offerer was committed to repurchase the identical goods it is not of the slightest significance that "storage, handling and transportation charges connected with the sale or resale were 'for the account of the offerer' (processor), and the offerer assumed all risk of loss." Since the offerer was committed to repurchase goods at the identical price which the Government had offered to sell to any other purchaser, it was entirely academic that the Government "obtained no right to sell the goods to other parties but was obliged to resell them at a loss to the processor."

The only real difference between Da-112 transactions and other admittedly valid purchases of dairy products under the Agricultural Act of 1949 is that under Da-112 the seller was required to agree in advance to repurchase and the Government in turn agreed to resell the identical goods at the established CCC selling price. The fact that this price was below what CCC agreed to pay for the goods was simply the consequence of the reduction in the level of price support for the ensuing year. This reduction was required by law as the Government concedes.

The Government argued below that this loss could have been avoided by the refusal of CCC to sell the goods below cost, but as the officials of the Department of Agriculture made clear in their testimony, this would have disrupted the entire program for the disposal of products held by CCC and would in the end have cost the Government a great deal more than the losses which resulted from the Da-112 transactions. For this reason, as the Court of Appeals concedes (App. B, *infra*, pp. 38, 39), "the program saved money not only for the processor but also for the Government."

CONCLUSION

By interpreting the word "purchase" in its so-called "normal" meaning, the Court of Appeals has construed the statute without regard to its purpose. This runs counter to the general principle that words in a statute having broad economic objectives must be construed in the light of those objectives rather than according to "technical classifications." *National Labor Relations Board v. Hearst Publications*, 320 U. S. 111 (1944). The determination of the Secretary of Agriculture that the economic character of transactions under Da-112 made them purchases with respect to the ends sought to be accomplished by the Agri-

cultural Act of 1949, was consonant with the legislative purpose and should have been accepted.

This is not to argue that the Secretary may engage in any operation which supports prices. In the present case the transactions involved the passage of legal title to specified goods for a specified consideration at a specified time. It is only by disregarding these legal formalities that the Court of Appeals was able to conclude that these transactions were not purchases. But if legal formalities are to be disregarded then we submit that the economic realities should control and that they are for the Secretary of Agriculture to determine rather than for the courts.

It is for these reasons that we urge that this petition should be granted.

Respectfully submitted,

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APPENDIX A

AGRICULTURAL ACT OF 1949

The pertinent parts of the Agricultural Act of 1949 (63 Stat. 1052; 7 U.S.C. 1421 *et seq.*) are as follows:

Sec. 1421 (Sec. 401 of Act). *Source of Price Support; Authority of Secretary; Factors Considered; Compliance by Producer; Time of Determining Levels.*

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. . . .

* * * * * *

Sec. 1426 (Sec. 406 of Act). *Advance Announcement of Price Support Levels; Variation of Levels.*

The Secretary shall, insofar as practicable, announce the level of price support for . . . agricultural commodities in advance of the beginning of the marketing year . . . the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

Sec. 1427 (Sec. 407 of Act). *Sale of Farm Commodities; Policies and Rates of Sale; Exceptions.*

The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section. [The section then sets forth certain restrictions on the sale of "basic" and "storable nonbasic" agricultural commodities] . . . .

Sec. 1428 (Sec. 408 of Act). *Definitions.*

For the purposes of this Act—

(a) A commodity shall be considered storable upon determination by the Secretary that, in normal trade practice, it is stored for substantial periods of time and that it can be stored under the price-support program without excessive loss through deterioration or spoilage or without excessive cost for storage for such periods as will permit its disposition without substantial impairment of the effectiveness of the price-support program.

* * * * * *

(c) A "basic agricultural commodity" shall mean corn, cotton, peanuts, rice, tobacco, and wheat, respectively.

(d) A "nonbasic agricultural commodity" shall mean any agricultural commodity other than a basic agricultural commodity.

Sec. 1429 (Sec. 412 of Act). *Determinations of Secretary as Final and Conclusive.*

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

* * * * * *

Sec. 1446 (Sec. 201 of Act). *Price Support Levels for Designated Nonbasic Agricultural Commodities.*

The Secretary is authorized and directed to make available (without regard to the provisions of sections 1447-1449 of this title) price support to producers for wool (including mohair), tung nuts, honey, Irish potatoes, *milk, butterfat, and the products of milk and butterfat* as follows:

* * * * * *

(c) *The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at*

such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefore as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat. (Italics supplied.)

COMMODITY CREDIT CORPORATION CHARTER ACT

The pertinent parts of the CCC Charter Act (62 Stat. 1070, 15 U.S.C. 714 *et seq.*) are as follows:

Sec. 714 (Sec. 2 of Act). *Creation and Purpose of Corporation.*

For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibres (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities, there is created a body corporate to be known as Commodity Credit Corporation (hereinafter referred to as the "Corporation"), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general direction and control of its Board of Directors.

* * * * * *

Sec. 714b (Sec. 4 of Act). *General Powers of Corporation.*
The Corporation—

* * * * * *

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. . . .

(j) Shall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid.

(k) Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

(l) May make such loans and advances of its funds as are necessary in the conduct of its business.

* * * * * * *

Sec. 714c (Sec. 5 of Act). *Specific Powers of Corporation.*

In the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to the Government Corporation Control Act, the Corporation is authorized to use it general powers only to—

(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations.

(b) Make available materials and facilities required in connection with the production and marketing of agricultural commodities.

(c) Procure agricultural commodities for sale to other Government agencies, foreign governments, and domestic, foreign, or international relief or rehabilitation agencies, and to meet domestic requirements.

(d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities.

(e) Increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.

(f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities.

* * * * * *

Sec. 714g (Sec. 9 of Act). *Board of Directors; Composition; Appointment, Tenure, and Compensation; Interim Board.*

The management of the Corporation shall be vested in a Board of Directors (hereinafter referred to as the "Board"). The Board shall consist of five members. The Secretary of Agricultural, or his nominee, shall be a member of the Board and the remaining members shall be appointed by the President by and with the advice and consent of the Senate. . . .

* * * * * *

Sec. 714h (Sec. 10 of Act). *Executive Staff; Composition; Duties; Appointments.*

Responsibility for the day-to-day conduct of the business of the Corporation shall be vested in a staff of executive officers headed by a chief executive appointed by the Board and responsible to the Board.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7579.

Swift & Company,
National Biscuit Company, and
The Great Atlantic & Pacific Tea Company,
Appellants and
Cross-Appellees,

Versus

United States of America,
Appellee and
Cross-Appellant.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Reargued April 25, 1958. Decided June 12, 1958)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

David R. Owen (Semmes, Bowen & Semmes on brief) for Appellant and Cross-Appellee, Swift & Company; William L. Marbury and John Martin Jones, Jr., (William E. MacKay, Walter S. Halliday, Jr., and Fred E. Campbell on brief) for National Biscuit Company and The Great Atlantic & Pacific Tea Company, Appellants

and Cross-Appellees; George Cochran Doub, Assistant Attorney General, and Marvin C. Taylor, Special Litigation Counsel, Department of Justice, (Leon H. A. Pierson, United States Attorney, on brief) for United States of America, Appellee and Cross-Appellant; and M. R. Garstang on brief for the National Milk Producers Federation, as *amicus curiae*.

SOPER, Circuit Judge:

The United States in these suits seeks to recover substantial sums of money paid by the Department of Agriculture, acting through the Commodity Credit Corporation, to Swift & Company, National Biscuit Company and The Great Atlantic and Pacific Tea Company under a program for price support of milk, butterfats and the products of such commodities in March and April, 1954. In all, payments amounting to approximately $2 million were made to 132 corporations. The payments were made and accepted in good faith in the belief of the parties that the Secretary was acting in accordance with the Agricultural Act of October 31, 1949, 63 Stat. 1051, 7 U.S.C. §1421 et seq., and particularly with §201, 7 U.S.C. §1446(c), which establishes price support levels for dairy products in the following terms:

> "(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat."

The crucial question is whether the transactions involved constituted purchases of the products of milk and butterfat. The Secretary concluded that the transactions were purchases within the meaning of the statute, but subsequently they were examined by the Fountain Committee, a sub-

Committee of the House Committee on Government Operations, 84th Congress, 2nd Session, and an opinion was sought from the Comptroller of the United States. He ruled that the transactions were not purchases and that the payments were unauthorized and improper. Accordingly the present suits were instituted. The District Judge reached the same conclusion and entered judgments for the United States against Swift & Company in the sum of $28,373.84; against National Biscuit Company for $108,693.78; and against The Great Atlantic and Pacific Tea Company for $109,572.55. The defendants have appealed from these judgments. The District Judge refused to add interest to the amounts which he found to be owing by the defendants and the United States has filed a cross-appeal from this ruling.

The transactions took place in March and April, 1954, but they will be better understood from a consideration of the following outline of prior transactions, undertaken by the Secretary of Agriculture to carry out the provisions of the Act, which were designed to afford price support to the producers of various agricultural commodities including milk and butterfat and the products thereof. During the course of the years two distinctive methods for increasing the income of dairy farmers have been evolved. One of these programs is designed to increase the market price of the supported commodity by limiting the supply. Under this method the Government makes a standing offer to purchase, and actually purchases, all quantities of the commodity offered at a pre-determined support price, and thereby so much of the supply as cannot be sold at the desired price level will be removed from the open market and the price level well be maintained.

The other method lets the market price fall through the sale of an unrestricted supply of farming commodities but assures a reasonable return to the farmer by giving him a direct subsidy payment. The amount of the payment is determined by calculating the difference between the free market price he receives for his products and the price the Department of Agriculture determines he should receive

so as to enable him to earn a profit. The basic economic difference between the two programs is that the former is designed to keep the market price up to the desired level through Government acquisition, while the latter lets the market seek its own level and supplements the farmer's income by direct payments.

Both of these methods have been tried under the authority of acts of Congress. The Agricultural Adjustment Act of 1938, 52 Stat. 31, 43, provided limited guarantees of prices ranging from 52 to 75 per cent of parity with those prevailing in the base period between 1910 and 1914. The Commodity Credit Corporation was the agency through which financial assistance was extended. The Steagall Amendment to the statute, passed in 1941, authorized the Secretary of Agriculture to support the price of nonbasic agricultural commodities such as milk at 85 per cent and later at 90 per cent of parity "through a commodity loan, purchase or other operation"; and a program was set up which provided for the purchase by CCC of cheese at one price without physical delivery and the immediate resale at a lower price. During the Second World War both direct payment and sale-and-resale at a loss programs were used in aid of the farming industry. The effect of these programs was to furnish an abnormally low market price to consumers; but when the programs were first restricted and finally abolished by Congress near the end of the war and prices consequently rose, resentment against the farmers was aroused and substantial harm to the market for dairy products ensued. It was under these circumstances that Congress passed the Agricultural Act of 1948 (62 Stat. 1247). It provided in Title I a temporary program under which the Secretary was directed to support the price of agricultural commodities, including the dairy products, by means of "loans, purchases and other operations." This was to continue until December 31, 1949, when a permanent farm program, set up by Title II, was to become effective. Therein price support was authorized by "loans, purchases, payments and other operations."

In the meantime, Secretary of Agriculture Brannon, who was then in office, proposed a plan which involved the maintenance of farm income by direct payment to farmers and permitted the sale of farm products in a free market. Congressional hearings were held on this subject during which the Secretary stated that Title II of the Act of 1948 was, in his opinion, broad enough to permit direct payment to farmers. So much opposition developed to the plan, however, that it was speedily abandoned and Congress repealed Title II of the Act of 1948 and passed the Agricultural Act of 1949.

General provisions contained in subchapter I of this statute define the power and authority of the Secretary of Agriculture in providing the price support authorized or required by the Act. The Secretary is directed by §401 of the Act, 7 U.S.C. § 1421, to provide the price support through CCC. Section 407, 7 U.S.C. §1427, provides that the corporation may sell any farm commodity at any price not prohibited by the section. Basic agricultural commodities and storable nonbasic commodities may not be sold at less than 5 per cent above the current support price; but no restrictions as to price are placed upon nonstorable or nonbasic commodities such as milk, butterfat and the products thereof. Section 406, 7 U.S.C. §1426, directs the Secretary, in so far as is practicable, to announce the level of price support for agricultural commodities other than field crops, in advance of the beginning of the marketing year or season, and the level of price supports so announced cannot be reduced during the year. Section 412, 7 U.S.C. § 1429, provides that determinations made by the Secretary under the statute are final and conclusive provided that they are not inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

The specific provision for the support of the prices of milk, butterfat and the products of these commodities is set out in §201, 7 U.S.C. §1446(c), set out above, which provides that the price level shall not be in excess of 90 per centum or less than 75 per centum of the parity price

and that price support shall be provided through "loans on or purchase of" the products of milk and butterfat.

Under this statute a series of annual diary price support programs, each to take effect on April 1st for the period of one year, were formulated and announced. The program for the year 1953-54 may be taken as typical, since it was similar in all essentials to those which prevailed in prior years. The Secretary announced on February 27, 1953, that milk and butterfat would be supported at 90 per centum of parity for the marketing year beginning April 1, 1953, and the announcement was followed by the publication, on March 12, 1953, of the 1953-54 price support document which outlined the basic policies to be followed by CCC in the ensuing marketing year. It was announced that butter, cheese and nonfat dry milk solids would be purchased as products of milk and butterfat in carload lots, and that with respect to cheese the style that would be purchased was limited to Grade A Cheddar of large size; and that during the year CCC would purchase, at prices fixed in the document, all quantities of dairy products without regard to the identity of the seller or the source, age or market value of the cheese. The purchase price of cheddar was fixed at 37 cents per pound and the purchase price of butter at 65¾ cents per pound, which were estimated to produce prices for the dairy products representing 90 per centum of parity. Dairy products acquired were to be sold at such prices above the purchase price as the President might approve which would not discourage manufacturers, processors or dealers from carrying normal inventories. Subsequent press releases established a resale price at a standard mark-up of 2 cents per pound for cheese and 3 cents per pound for butter above the support purchase price in effect at the time of the resale. These markups were identical with those previously establised in prior years.

Detailed procedures for carrying out the policies were also covered by announcements, which included Da-99 and Da-100 pertaining to the sale of butter and cheese to CCC, respectively, and Da-107 pertaining to the resale

of these commodities by CCC. Da-100 was a standing offer by CCC to purchase at 37 cents a pound all the cheese offered which met the specifications and provisions were made for the inspection and grading of the product. Offers were subject to acceptance within two days and after acceptance delivery instructions were to be made within seven days, after which an additional seven days were allowed to seller for delivery. Da-99 contains similar provisions in regard to the purchase of butter. Da-107 contained the instructions for the purchase from CCC of specific lots of dairy products at the sale price in effect at the time. In the case of cheese, the product was sold on the basis of the grading certificate covering it when it was purchased and the purchaser was required after acceptance of his offer to furnish a certified check within two days, and delivery to the purchaser at the Government warehouse was to be made within two days after payment. Title to the product was to pass to the purchaser when the product was removed from the warehouse or at the end of six business days after the notice to deliver, whichever first happened. The evidence showed that any person who sold cheese to CCC could subsequently repurchase the same cheese if it was then still available. The products were stored at Government expense until they could be given away or resold, usually at a loss.

The price support program for the year 1953-54 resulted in an increased production of milk and large quantities of butter, cheddar cheese and nonfat dry milk solids so that great quantities of these articles were accumulated notwithstanding every effort to dispose of them. Accordingly, on February 15, 1954, the Secretary announced that for the ensuing marketing year the prices of milk and butterfat would be fixed at 75 per cent of parity, and on February 18 that the support price for butter would be 57½ cents per pound and for cheese 32¼ cents per pound during the marketing year April 1, 1954 to March 31, 1955.

The production of milk and butterfat during the 1953-54 year was well known and the announcement of the

Secretary had been anticipated. The results of the change of policy were important. Prices paid to the farmers dropped suddenly and producers of cheese shifted from small-styles into large-styles which could be sold to CCC under the program of the current marketing year. Cheese, however, could not be sold to CCC until it was ten days old and had been graded. Consequently the prices that would be paid by the manufacturers to the farmers after March 15, would naturally seek the level of the prices which would take effect after April 1. Moreover, it was to the interest of all holders of cheese and butter to sell their holdings to CCC prior to April 1, with the prospect of replenishing their stocks on the open market under the lower price levels that would prevail after April 1. It was even possible for the producers to arrange to repurchase identical lots after April 1.

Some difficulty stood in the way of those who desired to follow this course of conduct in the latter part of February. The requirements for grading cheese prior to purchase by CCC could not be met under the established practice before the end of March, but if the inspection requirements were relaxed it would be possible for a processor to sell his cheese to CCC at 37 cents a pound up until the end of March and later to repurchase the same or similar cheese on or after April 1st at the announced selling price of 34¼ cents a pound for the year 1954-55. Similar arrangements would be made for the sale and repurchase of butter. These transactions required the processors to furnish certified checks so that their money was tied up for considerable periods, and in the case of cheese the further expenditure of 1½ cents a pound for packaging was involved. Notwithstanding these drawbacks, it was to the interest of the manufacturers to sell their product at the March price and repurchase it at the April price. If they did so, the Government surplus would be largely increased and the adequacy of the processors' inventories to meet the demand of the public would be jeopardized.

These circumstances led the Secretary to adopt a special program applicable to March and April 1954, which gave

rise to the transactions that are attacked in these suits. The Secretary issued a press release on March 4, 1954 which was followed on March 9, 1954, by announcement Da-112. Thereby the Secretary gave notice that for the remainder of the month of March CCC was prepared to purchase butter, cheese and nonfat dry milk solids under the 1953-54 program and to resell these commodities to the offerers at CCC domestic sales prices in effect during April. The offer to sell and repurchase was required to be submitted and accepted prior to the close of business on March 31. In each instance the transaction included an agreement on the part of the producer to repurchase the commodity in the case of butter on April 1, and in the case of cheese on April 1 or on the date of inspection, whichever was later.

The effect of such a transaction was, in the case of cheese, that the processor would sell its cheese to CCC at 37 cents per pound, the purchase price which had been fixed under the 1953-54 program, and would immediately repurchase the same for 34¼ cents per pound, the sales price fixed by the Secretary for the 1954-55 program. Certain procedures were outlined in announcement Da-112 in order to make these transactions feasible. The requirement as to inspection and grading of the cheese was relaxed so that it could be accomplished not later than April 30, after the offer to sell had been accepted instead of before acceptance as was the standard practice. Similarly the requirements for packaging and marketing the products in the case of cheese were relaxed.

Provisions relating to the delivery of the commodities and the passage of title were contained in the following provisions:

"9. Delivery:

"*Butter*: Butter offered under the terms of this announcement must have been graded before offered and must have been graded not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded, and at

the time the offer is accepted subject to quality requirements set forth herein as later evidenced by certificates issued by USDA.

"*Cheese*: Cheese offered under this announcement must be in existence, dated, and owned or under consignment to offerer not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later, subject to its meeting the quality requirements set forth herein, as later evidenced by certificates issued by USDA which may be dated after March 31, but not later than April 30, 1954.

* * * * * *

"The offerer, at his expense, shall hold for CCC at the location at which it is graded or sampled in case of milk, and delivered, the commodity which he has delivered to CCC from the time of delivery until CCC redelivers the commodity to the offerer. Failure of the offerer to hold the commodity for CCC until its redelivery to the offerer shall render the contract void."

Under these provisions there was no transfer of the custody of the products, which remained in the possession of the processors.

Certain provisions or options were given to the processors in order to encourage them to enter into the transaction of sale and repurchase. It was provided that if the CCC sale price in effect in April should be greater than the March 31 support purchase price, CCC would, at the offerer's request, relieve the seller of his liability to repurchase and to provide for its sale to CCC under announcements Da-99 and 100, which were standard in the 1953-54 year. The second option provided that under the same circumstances CCC would, at the offerer's request, render the contract void. These provisions were inserted to protect the processor in the event of the passage

of certain bills pending in Congress which would have required the Secretary to establish the price level of farm products at 100 per cent of parity.

In practical effect, the offerer also had the option to cancel the contract to sell the goods to CCC and to sell them elsewhere. Paragraph 9, quoted above, provides that failure of the offerer to hold the commodities for CCC until redelivery renders the contract void. The apparent breach of contract in such a case did not form the basis for any substantial cause of action against the offerer because it would occasion no damage to CCC but would actually result in a saving of money.

The transactions were further faciliated by the provision that settlement for the commodities purchased and resold should be merely on the basis of vouchers submitted by the offerer claiming the net difference between the sales price and repurchase price. The payment of this difference by CCC was the only money that passed hands in the course of the transactions.

On March 23, 1954, the dairy price support program was modified by making it applicable to so-called small-style cheeses. These had been excluded from the standard program and also from the program of Da-112, and in view of unfavorable conditions the manufacture of these styles had practically stopped. This was an unfortunate development since these cheeses were the most readily salable so they were included by the amendment in Da-112 and also in the program for the year 1954-55.

The practical effect of the program was that 132 contracts were entered into under Da-112 for the sale of 5 million pounds of butter and 86 million pounds of cheese and all of the contracts for the purchase of butter and all except six of the contracts for the purchase of cheese involving 252,683 pounds, were actually performed and payments were made by the Government. The economic effect of these transactions was described in the testimony of officials of the Department of Agriculture and of expert

witnesses who testified on behalf of the defendants. In their opinion the transactions (1) helped to support the price paid to dairy farmers for milk and butterfat during the month of March; (2) tended to assure the effectiveness of support activities during the ensuing year and to minimize the expense thereof; (3) promoted the orderly distribution of dairy products and the commercial consumption thereof; (4) saved the Government money and prevented useless expenditures by the butter and cheese industry.

The area of controversy is centered upon the meaning to be given to the direction of Congress that the Secretary, in performing the duty to support the price level of the products of milk and butterfat, must confine himself to loans on or purchase of the products. The controversy is narrowed in this instance to the meaning of the word "purchases", since loans were not attempted. In general terms, the position of the Government is that the word is to be given its normal meaning because there is nothing in the Act to indicate that a special meaning was intended and, more particularly, because the legislative history shows beyond dispute that Congress intended to forbid the Secretary to support the predetermined price level by direct payments or subsidies or "any other operations" than loans or purchases. Since the transactions undertaken by the Secretary under Da-112 did not constitute purchases in any realistic sense, they were not authorized by the statute and the payments made to the defendants must be returned. In addition, it is contended, for a number of reasons, that the transactions under Da-112 did not tend to effectuate the purpose of the statute to support the prices of dairy products in order to assure an adequate supply.

The defendants take a broader view of the meaning of the Act. They say that Congress omitted from the Act provisions empowering the Secretary to make "payments" or to engage "in other operations" to support prices, only to prohibit such operations as might tend to lower the market prices paid for the products, and that "there is nothing whatsoever to indicate that Congress intended to

prohibit any transactions which would support the price of cheese and butter." Hence the transactions under Da-112 were in conformity with the law, because on their face they purported to be purchases involving the transfer of title to specific commodities at a specified time for a specified consideration, and also because the economic effect of the transactions in keeping up the level of prices was the same as any ordinary purchase of products. In any event, it is said that the matter is not open to question in the courts since the Secretary properly determined that the transactions were purchases which would accomplish the purposes of the statute, and his determinations are made final and conclusive by § 412 of the statute, 7 U.S.C. § 1429.

It is our view that the Government's position is correct and we reach this conclusion irrespective of the effect that the Da-112 transactions may have had upon the price level of dairy products or the maintenance of the processors' inventories. The so-called sales of cheese and butter by the processors were not purchases by CCC in any normal sense of the word. The products never left the possession of the processors or came into the hands of the United States and were never intended to do so. In short, the products never moved and there was no delivery or intention to deliver. Storage, handling and transportation charges connected with the sale or resale were "for the account of the offerer" (processor), and the offerer assumed all risk of loss. The Government through CCC obtained no right to sell the goods to other parties but was obliged to resell them at a loss to the processor. On the other hand, the processor not only retained physical possession of the products but full power to disregard his contract to sell and repurchase and to dispose of or sell them to anyone he pleased without incurring any liability to the Government. CCC did not pay for the products which it purposed to buy and the processors did not pay for the products which they purported to buy back. Both transactions were settled by one check of the CCC for the loss incurred in the transaction, which it agreed in advance to assume.

In view of these established facts, the reference in paragraph 9 of Da-112, quoted above, to the delivery of butter and cheese and the transfer of title to the products, back and forth, had no actual significance. The transactions were correctly characterized in the testimony of the Chief of the Dairy Division of the Department of Agriculture before the Fountain Committee of Congress. He said that delivery and transfer of title under Da-112 was really just a paper transaction, which ended up with the Government owing the cheese manufacturer 2¾ cents a pound on all the cheese on which he had submitted claims; that instead of the Government buying the cheese from the manufacturer and the manufacturer then buying it back, what actually happened was that CCC sent the manufacturer a check for the 2¾ cents difference.

The Department of Agriculture has itself recognized that a sale and simultaneous repurchase of products at a loss does not involve a genuine purchase and sale. In a series of opinions by the Solicitor to the Secretary of the Department of Agriculture, which were supported by opinions of the Attorney General of the United States, it was pointed out that the Secretary was not authorized by the statute to support the price of dairy products by direct payments but only by loans and purchases, and it was specifically stated in the opinion by the Solicitor on October 15, 1954, that a purchase of commodities from a processor and the simultaneous sale back at a lower price "would constitute a mere device for the purpose of accomplishing by indirection what could not be accomplished directly."*

The defendants contend that these opinions have no bearing on the question before the court because they were not directed to the programs of price control promul-

* See the opinions of the Solicitor of the Department of Agriculture, May 7, 1954 and October 13, 1954; the opinions of the Attorney General, June 9, 1954 and December 29, 1954; and the letter of the Secretary to the Speaker of the House of Representatives, January 3, 1955, in which it was said that additional legislation would be needed to authorize a method of payment by the purchase-and-sale at a loss or a "wash sale" plan.

gated by the Secretary under the Act of 1949 but were spoken in condemnation of programs which would not accomplish the removal of surplus commodities from the market but allow them to find their own level in free competition. Even so, it is plain that the Department does not rest its actions on the reality of Da-112 transactions as purchases and sales, but on the ground that the Secretary has the power to follow any course which, in his opinion, will support prices at the desired level. In our judgment this position is untenable in view of the clear intent of Congress to confine the methods of the Secretary to purchases or loans.

There is no parallel between the facts of this case and those in *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, on which the defendants base their contention as to the extent of the Secretary's discretion. In that case the court accepted the conclusion of the Labor Board that newsboys continously and regularly engaged in selling papers are entitled to the protection of the National Labor Relations Act as "employees" of the publishers, who control the buying and selling prices, the markets, supplies and hours of labor, and furnish a substantial part of the equipment. The court held that, in reviewing the ultimate conclusions of the Board, it should not substitute its inference of fact for those of the Board if they are supported by substantial evidence and have a reasonable basis in the law. This decision is not persuasive here since Congress, after giving careful consideration to the matter, denied the Secretary broad discretion as to the methods of price support, and confined him to those specifically ennumerated in the Act.

Differences in opinion have arisen in this case as to the economic effect of Da-112 transactions. It is conceded that the program saved money not only for the processor but also for the Government, but it is insisted, for a number of reasons, that there is no reasonable ground for the view that they tended to support the market prices of the products for the benefit of the dairy industry. We do not enter into this controversy. We ground our opinion on the con-

clusion that it was well within the power of Congress to determine what methods should be employed to solve the economic problems arising in a difficult field and that the mandate of Congress must be obeyed.

The District judge denied interest prior to judgment on the sums received by the defendants on the ground that its allowance would be inequitable under all the circumstances of the case. The Government does not dispute the general rule that in suits for the enforcement of quasi contractual obligations arising from payments of money by mistake, interest is not allowed as a matter of right but depends upon considerations of practical justice and fairness. *Jackson County v. United States*, 308 U. S. 343, 350; *Royal Indemnity Co. v. United States* 313 U.S. 289, 296; *United States v. Bass*, 8 Cr., 215 F. 2d 9. The circumstances of the present controversy fully justify the application of the rule "which comports best with general notions of equity." The defendants entered into the transactions which gave rise to the present suits at the invitation of the United States, in the belief on both sides, that the payments were made in accordance with the governing statutes. Although it now appears that the payments were improperly made, it is conceded that one of the results of the transactions was the saving of a considerable outlay of money on the part of the United States. Furthermore, the department of the Government most concerned insisted for more than two years after the payments were made that the defendants were entitled to retain them, and apparently still holds this view notwithstanding the contrary opinion of the representatives of the Government who prosecute these suits. In view of these facts, it would be inequitable to add interest prior to the date when the judgments were rendered.

Affirmed.

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Nos. 270 and 271

In the Supreme Court of the United States

OCTOBER TERM, 1958

SWIFT & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

NATIONAL BISCUIT COMPANY AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 612–44) is reported at 152 F. Supp. 738. The opinion of the United States Court of Appeals for the Fourth Circuit (Swift Pet. App. B, pp. 20–35; A. & P. Pet. App. B, pp. 24–39) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1958. The petitions for writs of certiorari were filed on August 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Under the Agricultural Act of 1949, the Secretary of Agriculture's power to support the prices of whole milk, butterfat, and their products is limited to making "loans on, or purchases of" such commodities. When, on March 9, 1954, the Secretary announced that the level of support would be reduced on April 1 from 90% to 75% of parity, he authorized Commodity Credit Corporation to accept combination offers of manufacturers and handlers to "sell" butter and cheese to Commodity at one price and "rebuy" them from Commodity at a lower price, resulting, in each case, in a direct payment by the Government to the offerers at the difference between the two prices.

The question is whether these transactions exceeded the Secretary's power under the statute to support prices by "purchases."

STATUTE INVOLVED

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U. S. C. 1421, *et seq.*, are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

1. THE STATUTORY BACKGROUND

For an understanding of the transactions involved, a brief statement of the statutory background is desirable.

Government price supports on agricultural commodities began prior to World War II. Various methods of price support as to different commodities have been authorized by Congress and employed by the Department of Agriculture under different statutes. Thus, under the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended, 7 U. S. C. 1281, *et seq.*), the Secretary of Agriculture was authorized "to make *payments* to producers * * * [of basic crops]" (7 U. S. C. 1303, emphasis added) and "to make available *loans* on agricultural commodities (including dairy products)" (7 U. S. C. 1302 (1946 ed.), emphasis added). The so-called Steagall Amendment to that statute (which was passed in 1941, 55 Stat. 498) broadened the authority of the Secretary by permitting the use of a "commodity loan, purchase, *or other operation*" if necessary to encourage production during the war emergency (15 U. S. C. 713a–8, emphasis added).

By a later war measure (Executive Order 9250, dated October 3, 1942, 7 Fed. Reg. 7871), the Secretary was authorized to hold the line on OPA ceiling prices, and at the same time uphold necessary farm production, through a program of purchases-and-resales-at-a-loss, whereby manufactured dairy products were bought at one price and immediately resold to the vendor at a lower price without any physical de-

livery (R. 615). The vendors were required to pass on the payments to the dairy farmers whom the program was designed to aid.[1] Toward the end of the war, however, Congress restricted and eventually abolished the authority of Commodity to make direct subsidy payments or to engage in "purchase-and-resale-at-a-loss" programs (*ibid.*).

After the war ended, price supports for dairy products were once again found to be needed. Extensive congressional debates led to the passage of the Agricultural Act of 1948 (62 Stat. 1247). Under Title I of that statute, price support for the calendar year 1949 could be furnished by "loans, purchases, or other operations," and under Title II, support after January 1, 1950, could be effected by "loans, purchases, payments, and other operations." These statutory provisions authorized the use after January 1, 1950, of two methods of supporting agricultural prices: (1) the "purchase" method, under which excess supplies which will not move into consumption at the support level are removed from the market by government purchases; and (2) the "payment" or "subsidy" method, under which the prices of agricultural commodities are allowed to reach their free competitive level, and prices to producers are supported by payments (either direct or through manufacturers and dealers) based on the differential between the average market prices and prices at the desired support levels (R. 615–617).

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[1] Price supports through direct purchases of whole milk and butterfat cannot be used because of the perishable nature of those commodities.

The 1948 statute was not allowed to remain in effect. Strong opposition to the payment method of support developed, notwithstanding the fact that it was strenuously advocated by then Secretary of Agriculture Brannan. This opposition resulted in the passage of the Agricultural Act of 1949 (App., *infra*, pp. 19–20). The omission of the payment method from this statute resulted from congressional insistence that supports be limited to government loans or purchases in the market (R. 616). Thus, although the Secretary was given a broad discretion as to the details of price support programs (7 U. S. C. 1421 (b), 1429), the 1949 Act specifically limited and prescribed the permissible methods and levels of such supports. The statute provides that prices of dairy products shall be supported at such levels between 90% and 75% of parity "as the Secretary determines necessary in order to assure an adequate supply," and that "Such price support shall be provided through *loans* on, or *purchases* of, the products of milk and butterfat" (7 U. S. C. 1446 (c), emphasis added).

The normal program, which has been uniformly followed since 1949 except for the special plan presently under consideration, may be summarized as follows (R. 619–25): the Secretary determines the parity level believed necessary to assure an adequate supply, translates the parity level into dollars-and-cents support prices for milk and butterfat, determines and announces the government purchase prices for the products of these commodities (computed on the basis of the support prices for the raw materials plus manufacturing costs), and stands ready to buy throughout the marketing year all products offered

to Commodity at the support level which the commercial market cannot absorb.

2. THE TRANSACTIONS INVOLVED

For the marketing year ending March 31, 1954,[1] manufactured dairy products were supported by government purchases at the maximum level of 90% of parity; for example, cheese was purchased at 37¢ per pound and offered for sale at 39¢ (R. 623). Huge surpluses in government warehouses resulted. Because of this, Secretary of Agriculture Benson concluded that an adequate supply would be assured for the coming year with support at the minimum level of 75% of parity. Accordingly, he announced such a reduction in February 1954; for example, cheese would be purchased at 32¼¢ per pound instead of the previous 37¢ (R. 625).

The announcement served to confirm existing fears of the industry, and it accelerated changes which were already occurring. Inventories were reduced by manufacturers and handlers, with increasingly large amounts being sold to Commodity to guard against inventory losses. A substantial amount of production was converted to large size cheddars, which were the only styles acceptable for government storage. The prices of milk and butterfat being paid to dairy farmers, which had begun to fall in December and January, continued to decline through the remainder of the marketing year (R. 624).

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[1] The marketing year for milk and butterfat is April 1-March 31.

The Department of Agriculture feared that the price of milk would continue to fall to undesirable levels. It also feared that certain concerns would sell to Commodity such large parts of their regular inventories that a disruption of normal market conditions would occur, even though this might injure the good will of those concerns.

Faced with these unusual circumstances, the Department modified its normal program in several ways. Although Commodity usually did not announce the price at which it would *sell* products to the market until the beginning of each month, Secretary Benson announced on March 4 that the April sales price would be 2¢ above the announced 1954–55 purchase price for cheese, and 3¢ for butter, so that after April 1 cheese could be purchased from Commodity at 34¼¢ per pound (R. 625). This decision was supplemented by the issuance of Announcement Da–112, providing (as amended) for three major changes:

(a) To permit offers to sell to Commodity to be made during the closing weeks of March prior to inspection and grading (R. 626–27). Since cheese cannot be graded until at least ten days after production, cheese made during the last ten days of March normally is valued on the basis of the support level of the next marketing year.[3] Relaxation of the normal requirement that cheese be inspected before offer was designed to enable manufacturers to take advantage of the higher March support price of 37¢ per

[3] See note 2, *supra*.

pound, and thereby continue to pay higher prices to dairy farmers during those weeks (R. 626).

(b) To include "small sizes" of cheese in the price-support program for the first time. The declared purpose of the change was to afford manufacturers of such products "the same degree of protection against financial loss on inventories" as Da-112 afforded to other manufacturers (R. 632-33).

(c) To establish, for the March 9-March 31 period, the program which is in issue in these cases (R. 627-32). Under Da-112, manufacturers were permitted, during the remainder of March, to submit combination offers to "sell" to CCC at the 1953-54 purchase prices (*e. g.*, 37¢ per pound for cheese) and "rebuy" the identical goods at the lower 1954-55 sales prices (*e. g.*, 34¼¢ for cheese) which would go into effect on April 1. All such offers had to be accepted before March 31st. The time of "delivery" and "transfer of title" to Commodity was to be the date of Commodity's acceptance of the offer if the goods had been inspected before the offer, or the date of inspection (which could be at any time up until April 30), whichever was later. The "resale" to the vendor was to take place on April 1 or on the date of "delivery" to Commodity, whichever was later. Therefore, as to that cheese which was inspected after April 1 (approximately 51% of the total, R. 595), "purchase" and "resale" took place at the identical instant of inspection. As to all of the products, the risk of loss was at all times on the offerer. No physical delivery was made. Storage and handling charges were for his account. If the purchase and selling prices an-

nounced to go into effect on April 1 had been increased as a result of bills then pending in Congress, the offerer could cancel the entire contract or be relieved of his obligation to rebuy. If the offerer sold the goods to another buyer, he incurred no liability to the Government for breach of contract. Commodity, on the other hand, did not have the right to dispose of the goods as it saw fit, but was committed to "resell" them to the offerer. Commodity did not pay for the products it "purchased," nor did the offerers pay for the products they "rebought;" the transaction was settled by one check from Commodity for the difference between the "sale" and the "repurchase" prices (for example, 2¾¢ a pound in the case of cheese).[4]

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[4] In March 1954, 96,045,582 pounds of cheese were sold outright to CCC. 85,531,425 pounds were "sold" and "repurchased" under Da–112 by 103 concerns which received $2,094,549. (R. 596–97). 65 of these concerns had never sold cheese to CCC since January 1, 1953 (R. 646). 80,424,645 pounds of butter were sold outright to CCC. 5,227,589 pounds were put under Da–112 by 45 concerns which received $282,783.20 (R. 597, 611).

National Biscuit Company and A&P were not manufacturers of cheese or butter, and bought no milk for such manufacture (R. 598, 604). The 3,406,979 pounds of cheese included by A&P in its Da–112 transactions had been set aside for curing (R. 601). It had bought some of it from CCC in December at 39¢ per pound (R. 600). Practically all the 4,523,722 pounds of cheese involved in National Biscuit Company's Da–112 transactions had been set aside for aging prior to use in making other products, and was worth more than 37¢ per pound (R. 604–06). All of Swift's Da–112 butter was sold to the trade in April 1954. Its Da–112 cheese was sold to the trade, or used in making processed cheese in April and May (R. 609). No part of the specific money received under Da–112 was paid to the producers from whom the milk was purchased (R. 596).

3. THE PROCEEDINGS BELOW

In response to a congressional inquiry, the Comptroller General in 1955 ruled that Announcement Da-112 was beyond the authority of the Secretary of Agriculture on the ground that the transactions were not "purchases" within the meaning of the Agricultural Act of 1949. He therefore determined that payments made to manufacturers and handlers pursuant to the program were improper (R. 654–58). Accordingly, after demands for restitution proved unavailing, suits were instituted by the United States in the spring of 1956 to recover these payments.

The District Court (Thomsen, Ch. J.), agreeing with the Comptroller General's ruling, entered judgments against petitioners in the total amount of $246,640.17 (R. 612–44). The court held that the program was not directed as much toward aiding the producers as guarding processors against inventory losses, although aiding the former was the only proper objective under the statute. As to whether the Da-112 program had any effect on the prices being paid to dairy farmers during the closing weeks of March, the court found that the effect was "debatable" and that the evidence of benefit to farmers was "nebulous" (R. 637–38). The court found that Da–112 affected only those marginal items which were not needed for normal use and which were not clearly surplus, but which were included under Da–112 for the very purpose of avoiding their being withdrawn from the market after April 1 (R. 642–43).

The court also held that the Da–112 transactions were not "purchases" within the meaning of the Act and hence were not authorized. With respect to pe-

titioners' contention that the term "purchases" includes any transactions which would accomplish a "removal" of supply from the market, the court found that there was no removal in any realistic sense since manufacturers and handlers were at all times free to make any disposition of their products which they chose without incurring any penalty whatsoever, except loss of the payments under Da–112 (R. 642).

The Court of Appeals, in an opinion by Circuit Judge Soper, unanimously affirmed the judgment of the District Court (Swift Pet. App. B, pp. 20–35; A. & P. Pet. App. B, pp. 24–39). The Court of Appeals found it unnecessary to look to the actual effect of the Da–112 transactions since, in the court's view, they were clearly not "purchases" within the meaning of the statute. The court characterized the "delivery" of and "transfer of title" to the products as "a paper transaction, which ended up with the Government owing the cheese manufacturer 2¾ cents a pound on all the cheese on which he had submitted claims; that instead of the Government buying the cheese from the manufacturer and the manufacturer then buying it back, what actually happened was that CCC sent the manufacturer a check for the 2¾ cents difference" (Swift Pet. App. B, p. 33; A. & P. Pet. App. B, p. 37).[5]

ARGUMENT

The question decided by the courts below—whether the transactions involved here were included within

[5] The Court of Appeals also affirmed the District Court's denial of interest prior to judgment. The Government will not apply for certiorari on this question, although it is believed that the court was in error.

the scope of the term "purchases" as used in the Agricultural Act of 1949—does not warrant review by this Court, for the issue is not one of general importance nor is there a conflict of decisions with respect to it.

Announcement Da-112 instituted a novel program, lasting less than 45 days, that differed in many respects from the normal program which has been universally followed under the 1949 Act and which has never been departed from before or since the Da-112 plan. As petitioners recognize (A. & P. Pet. 6), it was a response to a wholly unique situation, and, in our view, one which is not likely to recur.[6] There is no conflict of decisions. The decisions of both courts below are in accord, not only with the Comptroller General's decision (*supra*, p. 10), but also with the decisions of the two other district courts which have considered the question.[7] Moreover, the

[6] Although now maintaining that the issue is of wide significance, Swift pointed out in its brief below that Da-112 was designed "to deal with a temporary situation resulting from an unprecedented reduction in the price support level as of April 1, 1954" (Br. 2). The brief of National Biscuit Company and A. & P. described the problem as an "unprecedented situation" (Br. 6). Similarly, the National Milk Producers Federation, appearing as *amicus curiae* for reversal, stated that Da-112 was "temporary and emergency in nature, made necessary by the sharp drop in the support level from 90 to 75 percent of parity on March 31, 1954" (Br. 10).

[7] Similar judgments have been obtained against other processors in the District Courts for the Western District of Wisconsin and the District of Minnesota, Fourth Division. *Kraft Foods Co., et al.* v. *Commodity Credit Corp.*, Nos. 2820-2822, 2824, 2827, 2830, 2889; W. D. Wis., June 20, 1958; *Land O'Lakes Creameries, Inc.* v. *Commodity Credit Corp.*, No. 5521, D. Minn., July 3, 1958. These judgments have been appealed to the Courts of Appeals for the Seventh and Eighth Circuits, respectively.

decisions below are correct. And, if it were deemed desirable to authorize such transactions for the future, this can be accomplished by congressional adoption of an amendment to the statute as suggested by the Secretary of Agriculture (*infra*, pp. 16–17, n. 9).

1. Both courts below recognized that the transactions under Announcement Da–112 constituted, in fact, subsidy payments to processors of dairy products, rather than purchases in the market designed to maintain prices received by farmers at the desired support level. Accordingly, irrespective of the arguments advanced as economic justification for this plan, both courts properly enforced the legislative judgment, expressed in the Agricultural Act of 1949, that the support program must be carried out not by payments but solely by purchases and loans (7 U. S. C. 1446 (c), App., *infra*, p. 20).

In imposing this restriction on the methods the Secretary of Agriculture is permitted to employ, Congress made no exception or provision for temporary problems that might result from the Secretary's compliance with the statutory mandate to fix support at the level which he believed would assure an adequate supply. Announcement Da–112, as already noted, instituted a novel program in response to a wholly unique situation. But this was not the kind of situation which it can be assumed Congress could not contemplate. Since the support level announced at the beginning of the marketing year cannot be reduced during that year (7 U. S. C. 1426, App., *infra*, p. 19), year-end inventory losses are bound to occur whenever the support level is lowered, and yet Congress

made no provision for payments to owners of cheese and butter to protect against such losses. The absence of such a provision, and the unambiguous limitations placed upon the Secretary's power, establish the correctness of the decisions which petitioners seek to have reviewed.

Although the transactions found to be invalid were clothed in terms of "purchase" and "sale," it is apparent that they were "paper transactions" amounting to nothing more than payments to offset inventory losses. No physical delivery was made or intended. Storage and handling charges were all "for the account of the offerer." Although risk of loss normally accompanies transfer of title, in Da–112 transaction the risk of loss was retained by the manufacturers and handlers. The Government did not have the right to sell the products to other parties but was obligated to "resell" them at a loss to the vendors. On the other hand, the processors not only retained physical possession of the goods as part of their inventories but also full power to dispose of them in any manner they wished without incurring any liability to the Government. If the support level actually put into effect on April 1 were higher than that announced on March 4th, the processors could cancel their entire obligations. And Commodity Credit Corporation did not pay for the products which it purported to buy and the processors did not pay for the products which they purported to buy back; both transactions were settled by a single government check for the loss which Commodity agreed in advance to assume.

Furthermore, there can be no doubt that, under the normal program, the cheese covered by Da–112 transactions would not have been sold outright to CCC with the idea of buying it back after April 1. Much of it was worth more than 37¢ per pound because of its age or moisture content, and there was no guarantee under the normal program that the identical cheese could be repurchased. In addition, the substantial charges for repackaging required under the normal program (but not under Da–112) would have prevented many sales. And finally, since market prices of cheese after April 1st would be approximately 32¼¢ a pound, manufacturers and handlers presumably could get all of the cheese they needed, other than seasoned cheese, by purchases from the commercial market at that price without having to pay the higher 34¼¢ price to Commodity.

2. Contrary to petitioners' contention (Swift Pet. 8–9; A. & P. Pet. 15–17),[8] the legislative history (see

[8] Petitioners' reliance on *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, is misplaced. This case, unlike *Hearst*, concerns express statutory limitations on the authority and discretion of the Secretary in the administration of the statute. These limitations are expressed in unambiguous terms and should be given their normal meaning since such an interpretation does not lead to "absurd or futile results" or results "plainly at variance with the policy of the legislation as a whole * * *." *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543. See also *United States* v. *Wurts*, 303 U. S. 414, 417; *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253.

Similarly inapposite is *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604. There is no parallel between the two cases. *Central Roig* involved the establishment of quota allotments under the Sugar Act of 1948, and this Court

pp. 3–6, *supra*) does not indicate that Congress intended to permit the use of payments to prevent inventory losses as long as they were made in the guise of a transfer of title for a consideration. Nor does the legislative history or language indicate that protection of processors against inventory losses by any other device was an objective of the price-support program; but yet that was the dominant purpose of Da–112. As found by the District Court (R. 638), these transactions were "not calculated to achieve the main objective of the price support program—the support of prices paid to farmers for their milk and butterfat."

Nor does the courts' interpretation conflict with prior administrative practice. As noted (*supra*, pp. 3–4), similar programs had been employed by the Secretary prior to the 1949 Act, but only under broader statutory grants of authority which, unlike the 1949 Act, permitted the use of "payments, and other operations." The Department of Agriculture has since stated to Congress that specific authority is needed to carry out programs of this type.[9]

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held that this was a matter committed to the discretion of the Secretary pursuant to legislative standards "of such breadth as inevitably to give the Secretary leeway for his expert judgment." 338 U. S. at 610. The present case concerns limitations expressly imposed by Congress on the methods available to the Secretary to carry out the statutory objectives. The determination of the extent and nature of these limitations is clearly a judicial function.

[9] In a report to the House Committee on Agriculture in January 1955 (H. Doc. No. 57, 84th Cong., 1st Sess.), the Department stated (p. 52):

"Another modification of the payment method would be the purchase-and-sale-at-a-loss or "wash sale" plan. For example,

Petitioners' stress that Da–112 was not a so-called "Brannan plan," under which the market price is allowed to reach a low competitive level and the difference between that and the support level is made up by income subsidies. But this amounts to a contention that any method of price support is permissible which Agriculture believes will tend to hold prices at support levels, at least if a transfer of legal title, however fictitious, is employed. This ignores the fact that the Secretary could have fulfilled his statutory obligation to maintain the support level throughout the marketing year simply by continuing to stand ready to purchase products at the announced figures, and that special efforts to insure an adequate supply, which is the only authorized statutory objective (7 U. S. C. 1446 (c)), were obviously not needed since the Secretary himself had determined that the supply was in great excess. It also ignores the fact, as found by the District Court (see p. 11, *supra*), that the Da–112 program did not effect a removal of supply from the market in any realistic sense. In rejecting petitioners' arguments, the courts below have simply given content to the congressional plan.

CCC might offer to buy from a processor all of the butter he produced at one price, and simultaneously sell it back to him at a lower price. Settlement actually would be made by paying the processor the difference between such prices, without taking delivery of the butter. Such a plan would have no advantage over simply making payments on production and would only make the program more complicated.

LEGISLATIVE AUTHORITY

"Additional legislation would be necessary to authorize payments to processors and dealers as a method of supporting prices to producers for milk and butterfat."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1958.

APPENDIX

The Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U. S. C. 1421, *et seq.*, provides in pertinent part:

7 U. S. C. 1421.

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. * * *

* * * * *

7 U. S. C. 1426.

The Secretary shall, insofar as practicable, announce the level of price support * * * in advance of the beginning of the marketing year * * * but the level of price support so announced shall not exceed the estimated maximum level of price support specified in this Act, based upon the latest information and statistics available to the Secretary when such level of price support is announced; and the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

* * * * *

7 U. S. C. 1429.

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the pro-

visions of the Commodity Credit Corporation Charter Act.

* * * * *

7 U. S. C. 1446.

The Secretary is authorized and directed to make available * * * price support to producers for * * * milk, butterfat, and the products of milk and butterfat as follows:

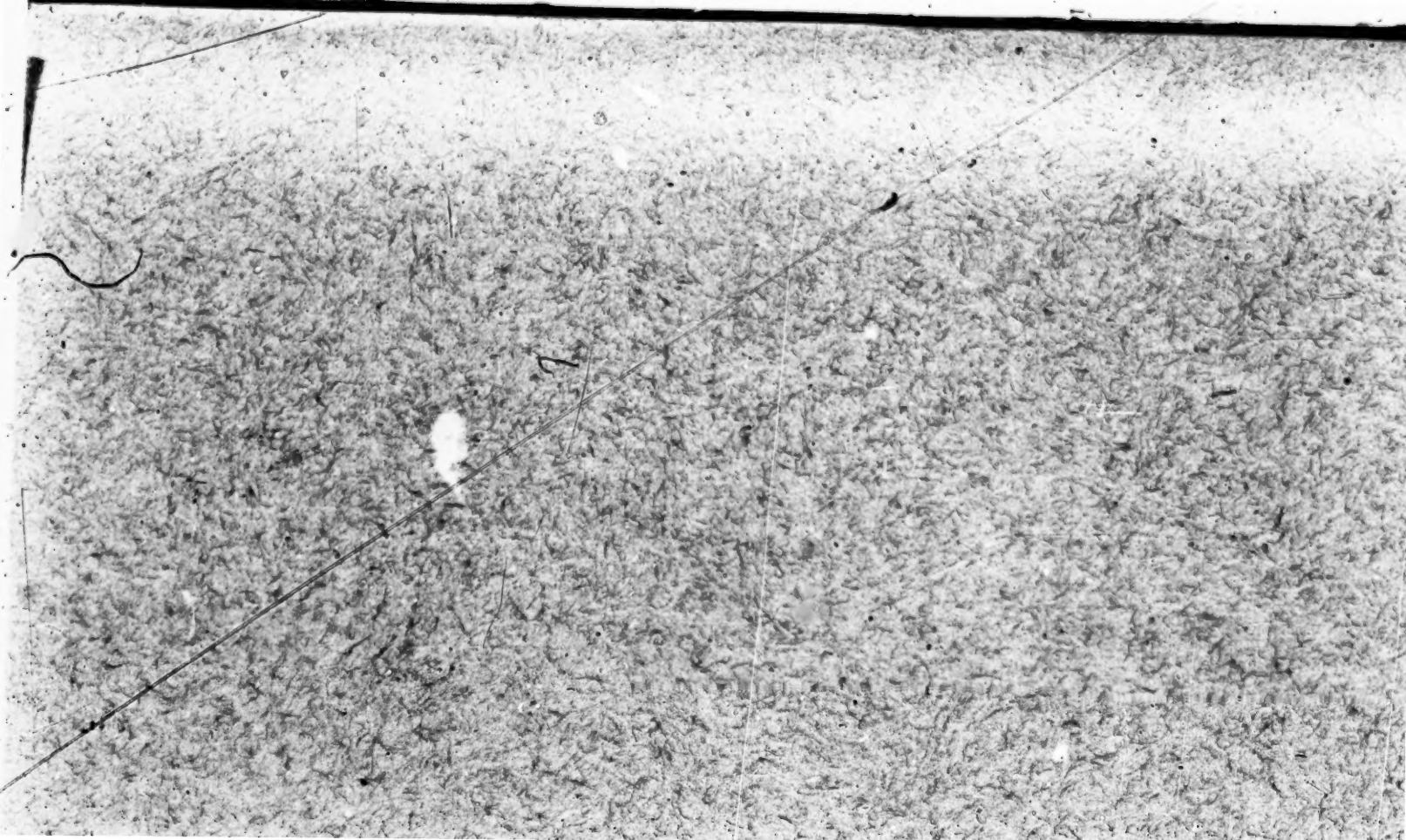
* * * * *

(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat.

7 U. S. C. 1447.

The Secretary is authorized to make available through loans, purchases, or other operations price support to producers for any nonbasic agricultural commodity not designated in section 1446 of this title at a level not in excess of 90 per centum of the parity price for the commodity.

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OCTOBER TERM, 1958

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v.

THE UNITED STATES OF AMERICA, *Respondent*.

No. 271

NATIONAL BISCUIT COMPANY, AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, *Petitioners*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

Brief of Amicus Curiae, National Milk Producers Federation, in Support of Petition for Writ of Certiorari

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THE INTEREST OF AMICUS CURIAE

The National Milk Producers Federation is a national farm organization in the nature of a trade association. It represents approximately half a million

dairy farmers and some 800 dairy cooperative associations which they own and operate. The Federation for many years has served as a national spokesman for dairy farmers before Congress and the Federal administrative agencies.

These cases involve the construction of the statute authorizing price supports for dairy farmers as producers of milk and butterfat (Sec. 201 of the Agricultural Act of 1949, 7 USC Sec. 1446, 63 Stat. 1052). The Federation participated in the drafting of this section, helped to develop the price support program which it embodies, and actively supported its adoption by Congress.

One of the deciding factors in these cases is whether Congress used the word "purchases" in that section to indicate transactions having all the formal characteristics of an ordinary commercial purchase or in a special sense to designate a purchase-type price support program as distinguished from a Brannan Plan, or subsidy-type, program. The Federation was in the thick of the Brannan Plan fight in Congress in 1949, and it was largely at our insistence that the Brannan Plan was rejected and a purchase-type support program was adopted for the dairy farmers. We asked that the word "purchases" be used in the statute and that the words "payments and other operations" be left out to preclude the use of the Brannan Plan for dairy products. The name of the Federation at that time was National Cooperative Milk Producers Federation.

The transactions involved in these cases were part of an operation carried out by the Secretary of Agriculture in an effort to fulfill his obligation under the

statute to maintain prices to dairy farmers, as producers, at the previously announced 1953-1954 support levels during the closing months of the marketing year ending March 31, 1954. The Federation acting for and at the request of dairy farmers urged the Secretary to undertake the 1954 operations in the hope that they would stop, or at least slow down, the premature sliding off of farmers' prices which were scheduled to drop from 90 to 75 percent of parity on March 31, 1954.

Dairy farmers represented through the Federation benefit from the price support program authorized by the 1949 statute. Without this statute, the current surplus production, although relatively small, would demoralize the market. Dairy farmers also benefited from the 1954 transactions. They maintained farmers' prices nearer 90 percent of parity during the last few weeks of the 1953-54 marketing year than would otherwise have prevailed. Moreover, the long range effect of those transactions was to make the support program more effective.

Thus in a very important sense it is our statute that is being construed and our price support operation that is under attack.

Some of the dairy cooperative associations represented through the Federation participated in transactions with the Commodity Credit Corporation similar to those under consideration in these cases, and demand has been made upon them by the Department of Justice for large sums of money on the ground that such transactions were illegal for the same reasons that the transactions in these cases are charged to be illegal.

The precedent which will be established in these cases, if the court reviews them, will determine whether

the Government has a valid claim against these dairy cooperatives because of such transactions.

The Department of Agriculture is an agency of the Government and cannot effectively speak against the Government in this case in support of the dairy farmers' price support program; although it stoutly maintains that it acted in good faith and within its statutory authority.

The Federation has an interest in this case which goes beyond the immediate issue, the validity of the 1954 transactions, because the interpretation of the statute adopted by the Court of Appeals adversely affects the price support program under which dairy farmers must live by unnecessarily and erroneously limiting its operation to ordinary commercial type purchases. In this respect our interest differs from that of the defendants.

ARGUMENT

We appreciate the privilege of presenting this amicus brief. We shall endeavor not to duplicate the briefs of the parties to the suit but, instead, to reflect in general terms the viewpoint of the dairy farmers whose price support statute and price support transactions are caught in a cross-fire between contending Government agencies.

Importance of the Case

The decision in this case is important to dairy farmers, and to the dairy industry generally, because it involves the operation of the current price support program. The narrow interpretation placed on the statute by the Court of Appeals casts doubt upon price support operations which in all respects are consistent

with the objectives of Congress but which may fail to meet some characteristic of an ordinary commercial purchase. Factors which adversely affect the dairy industry adversely affect the public generally because of the vital importance of milk and dairy products to the welfare and economy of the Nation.

The Decision Below is Wrong

The decision of the Court of Appeals raises important questions of Federal law, which have not been, but should be, settled by this Court. It is unduly narrow, interferes with the policy of Congress, and sets aside economic decisions of the Secretary of Agriculture which the statute provides shall be final.

Both the District Court and the Court of Appeals held the 1954 transactions invalid primarily on the ground that they did not conform in all respects to the technical requirements for ordinary commercial sales. Congress did not intend the word "purchases" as used in the statute to be limited to ordinary commercial purchases where the objective is to acquire and retain the commodity. On the contrary, it intended the word to designate a purchase type of support program, where the true objective is not to acquire or retain the commodity at all—except to the extent that it is necessary to do so to support the market price by providing a reservoir into which the surplus can flow until such time as there is a demand for it in the commercial trade at the current support level. Obviously, the criteria for determining the validity of the subject transactions are quite different under the two interpretations.

All of the legislative history of the statute supports the latter interpretation. There is nothing in the

legislative history to indicate that Congress intended to limit the support operations to ordinary commercial purchases. What Congress did intend was to limit support to a purchase-type program as distinguished from a Brannan Plan program.

The Legislative History

The intention of Congress is best ascertained when the words used are read in the same light that was available to the Congress that adopted them. The wording of section 201 of the Agricultural Act of 1949 (7 USC Sec. 1446; 63 Stat. 1052) has a special meaning readily understood when considered in connection with the conditions that prevailed in the 1949 session of Congress.

We are hopeful that in this brief we can help to recall the legislative atmosphere in which Congress passed the statute under consideration, because we were there when the statute was passed. With respect to the dairy support program, we asked that supports be mandatory, and for the first time dairy price supports were provided on a mandatory basis. We suggested that the price support range be set between 75 and 90 percent of parity and that the Secretary determine the level within that range. We asked, especially, for a purchase-type program which would result in market prices being supported instead of a Brannan Plan or subsidy-type program which would permit market prices to drop.

The legislative history of the 1949 Act leaves no doubt that Congress intended to give the dairy farmers the type of support program they wanted—not the kind Secretary Brannan was recommending for them. Since it was the Federation, speaking for the dairy farmers,

that told Congress what the dairy farmers wanted, we feel that we are in a position to comment with special knowledge on what Congress had in mind when it used the words that it did.

Dairy farmers had gone through an unhappy experience with subsidies during the war years when they were used to keep consumer prices down. Consumers developed a false sense of value, and there was a sharp reaction against dairymen when the subsidies were removed and dairy prices returned to their true level.

The subsidy issue became explosive in 1949 when Secretary Brannan announced the Brannan Plan. There was an immediate reaction against it. Our people turned against it as soon as they learned that it contained provisions for a subsidy-type program which would again develop a false sense of value on the part of consumers. Under the Brannan Plan, market prices would be permitted to fall, consumers would enjoy abnormally low prices, and the income of farmers would be supplemented through subsidies.

The various drafts and redrafts of the bill as it moved through Congress reflect the battle between the Secretary and the Federation. In the final bill, the words "payments and other operations" were left out of the dairy section because they had acquired a special meaning signifying the Brannan Plan, and the Secretary was directed to support dairy prices through "purchases" because that word had acquired a special meaning signifying a purchase-type of support program. This wording was not used to limit dairy supports to ordinary commercial purchases. What Congress did was to reject Secretary Brannan's proposal and give the dairy farmers what they asked for—a

purchase-type program, then well understood and previously used, under which market prices are maintained at a fair level by providing a reservoir into which surplus commodities can flow at support prices when there is no demand for them at such prices in the commercial market.

No Brannan Plan in 1954

The transactions challenged here did not constitute a program of the Brannan Plan type which Congress intended to preclude when it enacted the dairy section of the 1949 Act. There are many distinctions, but the important and fundamental reason is that they were not designed to permit the market price to fall below the support level. On the contrary, their sole objective was to maintain the market price for dairy products, and thereby support producer prices at the then applicable support level, until the close of the marketing year, March 31, 1954. They were, therefore, purchase-type support transactions of the kind which Congress authorized in the 1949 Act.

Butter and cheese committed under announcement DA-112 did not move into the channels of commercial trade at less than the applicable support price during the marketing year ending March 31, 1954. Neither did these products move into the trade after March 31, 1954, at less than the then applicable, but lower, support price set up for the following marketing year. There was nothing in this operation which was not consistent with the objectives of the 1949 Act or which resulted in letting market prices fall through the use of a subsidy. Instead, the transactions were designed to support market prices at the 90 percent of parity level through the full term of the 1953-54 marketing

year for which that level had been set and then, on April 1, to permit them to drop to the new 75 percent support level which was to be applicable for the next marketing year beginning on that date.

The products released in April in accordance with announcement DA-112 were made available to the trade in the 1954-55 marketing year at prices above the then applicable support level. The fact that these sales were below the support level for a prior marketing year did not impair the support price in effect at the time the product was permitted to move into commercial channels in the new marketing year.

The DA-112 transactions were the result of an administrative decision which the Secretary had to make in the light of the facts then available and in the time at hand. We believe his decision was sound and that it was reasonably calculated to further the objectives of the program. The statute provides that the Secretary's decision shall be final (Section 412 of the Agricultural Act of 1949, 7 USC 1429, 63 Stat. 1057) so the trade can and will rely on it. Many of our cooperative members did rely on it and have paid out money to the farmers which they cannot now recover.

The Secretary was under a directive from Congress to maintain dairy farmers' prices at the announced support level of 90 percent of parity for the full term of the 1953-54 marketing year ending March 31, 1954. These prices were starting to slide off well in advance of the end of the marketing year in anticipation of the sharp drop in dairy product prices scheduled to go into effect on April 1. Had the Secretary not made full use of the authority available to him to stem this premature dropping of the farmers' price, we think he would

have been derelict in carrying out the wishes of Congress.

Charges that the Secretary's decision was unwise, that he should have acted earlier, or that the 1954 transactions could have been better safeguarded are not properly addressed to the Court. The only issue here is whether his actions were within the very broad discretionary authority of the statute and reasonably calculated to carry out the objectives of the 1949 Act. It is conceded that the Secretary acted in good faith.

It was known in advance that some of the products sold to CCC in March at the March support level would be repurchased by the trade in April at the lower April support level plus the standard mark-up, and there was no inconsistency in permitting the March offer to be combined with an agreement to repurchase in April as was done in DA-112. Neither was there any reason to require such products to be moved into CCC warehouses and later retransported to the offerer.

The DA-112 transactions actually operated effectively to carry out the support program. Butter and cheese placed under DA-112 would not and did not move into the commercial market during the 1953-54 marketing year at less than the support price in effect for that year. The so-called options to the contrary notwithstanding, there was no incentive to withdraw and sell on the market for less than the DA-112 support price already available through CCC.

Had sales become available on the market at prices above the DA-112 support price, withdrawing the product from DA-112 for such sales would not have interfered with the objective of maintaining the support level. In fact, permitting the product to flow back

into the trade at prices equal to or above the support level is consistent with the theory of the purchase-type program. The effect is to stabilize the price at the support level and prevent fluctuating lows and highs.

Eliminating needless waste and expense in transportation, storage, and packaging under DA-112 did not interfere with the support program, and it did result in substantial savings to both the Government and the offerers. The fact that there was a settlement of accounts covering March purchases and April resales and that one check was issued for the difference did not change the effect of the transactions for price support purposes nor result in a subsidy of the Brannan Plan type which Congress intended to preclude in the 1949 Act.

The DA-112 transactions did not result in windfall profits to the companies involved. The products that they sold to CCC in March under DA-112, like the products they sold to CCC under DA-99 and DA-100, had been made from milk and butterfat bought from farmers when prices were supported at the higher level in effect for the marketing year ending March 31, 1954. These sales to CCC were in accordance with the commitment announced in February 1953 that CCC would buy such products at any time throughout the 1953-54 marketing year. These same products that the companies bought back from CCC at lower prices in April were subsequently marketed by them in a period of lower market prices.

The benefits to producers which resulted from the DA-112 transactions are not measured by the number of dollars involved in those contracts. To the extent that milk prices were strengthened in the latter part

of the 1953-54 marketing year, benefits accrued to farmers from sales of milk all over the Nation.

CONCLUSION

Whether the transactions here involved complied with all of the technical requirements for ordinary commercial purchases is not controlling in determining their validity. The important factor is whether they were consistent with the objectives of the statute. The DA-112 transactions were consistent in all respects with the objectives of the purchase-type support program authorized by Congress and were reasonably calculated to further the objectives of the statute.

This case is of great importance to the dairy industry and to the Nation generally because the narrow construction placed on the 1949 Act by the Court of Appeals adversely affects the current support programs for milk and dairy products.

We urge that the petition for a writ of certiorari be granted and that the decision of the Court of Appeals be reviewed by this Court.

Respectfully submitted,

E. M. Norton
M. R. Garstang
Counsel for the National Milk Producers Federation

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Office Supreme Court, U.S.
FILED
SEP 23 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 270 and 271

SWIFT & COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

NATIONAL BISCUIT COMPANY AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN BOTH CASES

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The Daily Record Co., Baltimore 3, Md.

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REPLY BRIEF OF PETITIONERS IN BOTH CASES

Preliminary Statement

Aside from the bare assertion that no issue of "general importance" is raised by the dispute in the present case between the Secretary of Agriculture and the Comptroller General as to the scope of dairy price support permissible under the Agricultural Act of 1949, the Government's brief in opposition is nothing more than an argument on the merits. We do not believe this to be the appropriate time

to reply to each contention so advanced. However, we do believe that some notice must be taken of certain statements made by the Government which to say the least are highly misleading.

The Importance of the Question Presented

The main argument advanced by the Government in support of its assertion that this case is not important is that the Da-112 transactions covered a period of less than forty-five days. This, it says, together with the fact that the circumstances giving rise to the need for the Da-112 program were unprecedented, shows the case to be of no general importance. But the effect of this decision on the administration of dairy price support goes far beyond the particular transactions involved in this case. By holding that the term "purchase" as used in the Act excludes what would not "normally" be considered as a purchase in spite of the economic effect of the transaction and irrespective of whether or not it subserved the purposes of the statute, the courts below have stripped the Secretary of all discretion in the implementation of a statute which the Government concedes calls for the purchase *method* of price support (US Brief, pp. 4-5). In short, the Secretary is placed in this position: When he is faced with a situation which cannot be handled effectively by transactions which the lower courts have found to be "normal purchases", he is unable to act at all. For, had "normal purchases" not been ineffective, the undesirable circumstances would not have arisen in the first place.

Moreover, the factual situation which gave rise to Da-112, although unprecedented up to that time, can hardly be said to be unique or "not likely to recur". Even a superficial knowledge of current agricultural events would make the Department of Justice aware of the fact that the market

conditions which necessitated Da-112 were duplicated in March and April of this year when Secretary Benson again reduced the support levels for the ensuing market year commencing on April 1. Although it is not in the record and could not be since the record in this case was closed, it is a matter of common knowledge in the industry that the Department of Agriculture, in March of 1958, gave serious consideration to a program similar in all respects to Da-112 and that at least one of the reasons why it was not instituted was the refusal of the industry to participate in any special program — however beneficial to the Government and to the industry — until the extent of the Secretary's authority in this area has been finally determined.

The best test of the importance of this case to the administration of the Agricultural Act of 1949 would seem to be the significance which the Department of Agriculture and the dairy farmers themselves attach to it. The dairy farmers, through the National Milk Producers Federation, *amicus curiae*, clearly state that they feel the matter to be of prime importance. The participation in this case by representatives of the Department of Agriculture — as seen by the record — is eloquent testimony as to its views on the matter. In this connection, it should be noted that the Department of Justice has carefully refrained from making any statement in its brief as to Agriculture's position on this question, and has maintained this silence in spite of our contention that fairness requires the Attorney General to inform this Court of the Secretary's views on the importance of the case to his administration of the Act (Swift Pet., p. 12). We sincerely believe that this studied silence is contrary to the plain duty of the Department of Justice to apprise this Court of all relevant facts.

Legislative History and Administrative Construction

A full statement of the pertinent legislative history in this case is set forth in appendixes B and C to the A & P brief filed in the lower court, and filed with this Court along with the petitions. We do not intend at this time to duplicate that statement, but merely to correct certain serious misstatements by the Government at pages 3-6 of its brief.

Far from prohibiting purchases and resales at a loss, the legislative history makes it quite clear that in using the word "purchases" in the Agricultural Act of 1949, Congress intended to authorize such transactions, provided always that they were not in the nature of subsidies which permit the price of the product to fall in a free market. This is made clear by the Congressional history surrounding the OPA resale-at-a-loss program discussed at pages 3 and 4 of the Government's brief, and printed as Defendant's Exhibit 2 (RA, pp. 434-439). In the Congressional debate over that program, Senator Taft explained from the floor (89 Cong. Rec. 6461) that the authority for such a program was not the subsidy power afforded by executive order, but was merely the power to buy commodities and to sell commodities. When questioned by a Congressional committee as to the authority of CCC to engage in the OPA purchase and resale at a loss program, the Solicitor for the Department of Agriculture relied solely on the corporate charter power of CCC "to buy commodities and, of course, to sell commodities". Hearings Before The House Committee on Banking and Currency, 78th Cong., 1st Sess., on H.R. 2725, p. 113. The Government's statement (U.S. Brief, p. 3) that this program was authorized by Executive Order 9250 is just not correct. The Executive Order authorized CCC to use any *existing* power which it had to en-

gage in such activities. It was the power to buy and sell that allowed CCC to establish the program.

In line with this understanding, Congress gave the Secretary the power to purchase cheese and butter (7 USC 1446(c)) and the power to resell such commodities at any price he saw fit, including sales below acquisition price (7 USC 1427). And that is all that he did in the present case. Thus, the question is not whether Da-112 was a *purchase and a resale* at a price less than the acquisition price, but rather whether the purchase phase of the transaction was a "purchase" within the meaning of the Act.

Although cited as an indication that the Department of Agriculture took the position that *all* purchases and resales at a loss are unauthorized under the 1949 Act, the report cited in footnote 9 of the Government's brief, when read in context, makes it perfectly clear that the program to which reference was made was one in which the resale at a loss procedure was used to effect a subsidy. When a purchase and resale at a loss procedure is so used, CCC purchases the entire production of a given commodity at a price which reflects the desired level of income to the farmer and immediately thereafter resells the commodity at whatever lower price is necessary to allow the seller to then place the product on the open market at whatever price the law of supply and demand will bring. This type of operation will, of course, not support the price of the product in the open market, but will in fact drive it down.

Under Da-112 transactions, on the other hand, the product was purchased by CCC at the purchase price in effect at the time of the contract, i.e., the 1953-1954 support purchase price, and resold *after April 1* at the usual mark-up above the then current support purchase price. These transactions, therefore, *supported* the market price of the

commodity by relieving the pressure on the market during the remainder of March, and by returning the products to the market only after April 1 — and then at a price above the then current CCC purchase price. The unanimous opinion of all economists who testified at the trial was that these transactions, unlike the subsidy procedure, supported the price of the commodity in question (Black, RA, pp. 315-320; 321-322; 334; 337; 338-341; 342-343; Gaumnitz, RA, pp. 180-183; 186; 188; 193; 203-205; 230; Emery, RA, pp. 68; 57-60; 61-68; 84; 91-92).

The distinction between these two types of purchase and resale at a loss operations can be seen from the opinions of the Solicitor of Agriculture and the Attorney General of the United States which were offered in evidence as Plaintiff's Exhibit 46 (RA, pp. 567-576) and Plaintiff's Exhibit 43 (RA, pp. 576-580). The Solicitor held that a purchase and resale at a loss program of the type described in the Secretary's report to Congress discussed above could not be instituted under the Agricultural Act of 1949. The Solicitor's view was adopted by the Attorney General in his opinion on the express assumption that it was based on the "use of the so-called wash sale operation to circumvent the legislative purpose in not authorizing subsidy payments as a method of support" (RA, p. 578). In view of the clear distinction between these two methods and the express concession by Government counsel that the opinions of the Solicitor and the Attorney General deal with problems not present in this case (RA, pp. 117-118), we are somewhat surprised at the Government's attempt to lead this Court to believe that no such distinction exists.

The Transactions Involved

The discussion of the transactions involved at pages 6-9, as well as the argument at pages 14-18 of the Government's

brief disclose the superficial nature of its position. The Government merely catalogues the various ways in which the Da-112 transactions differ from ordinary commercial purchases. Thus, it points out that no physical delivery was made; that the risk of loss remained with the seller; that one check was sent by CCC instead of two checks, one from the purchaser to CCC, and one from CCC back to the purchaser; that CCC was "committed" to resell the goods to the purchaser. In the first place, the elements mentioned by the Government, even under a strict application of ordinary sales law, do not prohibit title from passing and a completed sale from taking place if the parties express their intention to effect a sale, as they did in this case. (Uniform Sales Act, Secs. 1, 18; Williston, Sales, Secs. 261, 302; *Briggs v. United States*, 143 U.S. 346, 354.) Secondly, and more importantly, none of these elements has anything to do with *price support* and the Government does not even attempt to point out how their lack in any manner hampered the price supporting effect of Da-112.

Footnote 4 of the Government's brief is nothing more than a restatement of the argument — which was rejected by both of the courts below — that CCC should deal only with those companies which in turn deal directly with the farmer. However, the undisputed testimony in the record is that the integrated nature of the dairy industry requires CCC to purchase from anyone having cheese in carload lots. This policy was established at the inception of price support programs and has been adhered to ever since (RA, pp. 22-24). It may be noted in passing that Swift & Company deals directly with the farmer as a manufacturer, and that although A & P and National Biscuit do not deal directly with the farmer, they are substantial purchasers of cheese and butter from manufacturers who do.

In fact, A & P purchases the entire output of from twenty to twenty-five cheese factories (Stipulation of counsel, RA, p. 598).*

However convenient it may be for the Government to cite statements by the District Court to the effect that "evidence of benefit to farmers was nebulous" (US Brief, p. 10), the fact remains that the Court of Appeals did not affirm this opinion of the lower court. In fact, the Court of Appeals summarized the testimony of the expert witnesses as follows (A & P Pet., p. 35): "[These transactions under Da-112]—

(1) helped to support the price paid to dairy farmers for milk and butterfat during the month of March.

(2) tended to assure the effectiveness of support activities during the ensuing year and to minimize the expense thereof;

---

* The record is clear that had the petitioners: (1) signed two pieces of paper instead of one; (2) written one check and received one back from the Government, instead of one check for the difference; and (3) made a senseless physical delivery of cheese to CCC, and received an equally senseless physical redelivery, the transactions would not have been subject to dispute, even though the exact same result would have been achieved. The undisputed evidence in the Record is that the petitioners could have sold their cheese and buttter to CCC under announcements Da-100 and Da-99 and repurchased the same at the lower price under announcement Da-107. And such repurchase could have been made prior to the time that the seller was called upon to make physical delivery to CCC, due to the administrative time-lag (RA, pp. 72-73; 76-77; 128-131). The record shows that this was in fact done in certain cases (RA, pp. 546-551). The Government's statement, at page 15, that substantial charges for re-packaging would have prevented many sales of cheese can hardly apply to the present petitioners. By its statement in open court (RA, p. 359), the Government conceded that A & P's and National Biscuit's cheese was already packaged in boxes which met the requirements of Da-270 (standard packaging specification), and thus could have been sold under Da-100 without repackaging. As to Swift, the uncontradicted testimony is that the cheese would have been sold in any event, and the re-packaging charges, where applicable, absorbed (RA, p. 248).

(3) promoted the orderly distribution of dairy products and the commercial consumption thereof;

(4) saved the Government money and prevented useless expenditures by the butter and cheese industry."

In view of the fact that there was no evidence to the contrary, it is not surprising that the Court of Appeals declined to subscribe to the District Court's economic judgment, and grounded its opinion solely on the definition of the word purchase, "irrespective of the effect that the Da-112 transactions may have had upon the price level of dairy products" (A & P Pet. 36). Surely the determination of the Secretary of Agriculture as to the economic effect of a given transaction, supported as it was by the unanimous testimony of all the economic witnesses who testified at the trial, is worth more than the mere *ipse dixit* of the Department of Justice or the unaffirmed opinion of the trial judge — *a fortiori* when the dairy farmers themselves tell this Court that they did receive benefit from the Da-112 transactions (Brief of *Amicus Curiae*, pp. 10-12).

Conflict With the Hearst Case

The Government's attempt, in footnote 8 of its brief (p. 15), to demonstrate that this case is not in conflict with *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, is as superficial as it is unconvincing. Of course, the present case involves limitations on the Secretary's authority, but the statute involved in the *Hearst* case placed similar restrictions on the Board. In our case, the Secretary can only make "purchases"; in the *Hearst* case, the Board only had authority to deal with matters between employers and "employees". The question in the *Hearst* case was what are "employees"; in our case, what are "purchases". This Court held in the *Hearst* case that

in determining whether a given person was an "employee", the Board's decision would be upheld if compatible with the economic objectives of the Act — even though, under other circumstances, the technical legal aspects of the relationship would have required the conclusion that newsboys were independent contractors and not employees. As stated in our petitions (A & P Pet., pp. 13-15, Swift Pet., pp. 7-8), we think that the same principles apply to this case, and that the decisions below are clearly in conflict with the *Hearst* case.

Conclusion

Fortunately for the petitioners, Judge SOPER'S opinion contains a clear and simple statement of facts which cannot be obscured by any amount of broken-field running. When, therefore, it is insinuated by the Government that the Secretary of Agriculture has attempted to pervert statutory powers conferred on him to support prices to dairy farmers by using them improperly for the protection of a few large processors against inventory losses, we can simply refer to the fact that the Government has expressly conceded the good faith of the officials of the Department of Agriculture and of the defendants (RA, pp. 2, 597), and that as noted by the Court of Appeals, the Government has conceded that the transactions under Da-112 resulted in saving money for the Government (A & P Pet., pp. 38-39). These two admissions would seem a sufficient answer to an argument which might with more propriety have been addressed to a Congressional committee or perhaps to a jury. If a further answer were necessary, the appearance in the courts below and in this court of the National Milk Producers Federation in full support of the position of the petitioners should dispose completely of this flagrant attempt to create prejudice against the petitioners. Within

the appropriate limits of a reply brief, it is not possible to expose every instance in which such tactics have been employed, but we believe that enough has been said to show that the petitions for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner,
Swift & Company.

WILLIAM L. MARBURY,
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Attorneys for Petitioners,
National Biscuit Company and The Great Atlantic & Pacific Tea Company.

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Supreme Court, U.S.
FILED
NOV 6 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 270

SWIFT & COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

DAVID R. OWEN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 270

SWIFT & COMPANY,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

By order dated October 13, 1958, this Court denied the petition filed in this case for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. At that time, other cases were pending involving the identical issues presented in this case, in which notices of appeal had been filed in the Courts of Appeals for the Seventh and

Eighth Circuits.* (See Brief Of The United States In Opposition, page 12, note 7.) Since then, we are informed that the appeals in the Seventh Circuit are about to be perfected by filing the record in that court, and we are informed that the appeals in the Eighth Circuit will be similarly perfected shortly.

Petitioner believes that the Courts of Appeals of the Seventh and Eighth Circuits may well reach a result contrary to that which the Court of Appeals for the Fourth Circuit reached in this case. In that event should the Government petition for certiorari and should the petition be granted (if for no other reason than to reconcile a conflict of decisions among the Circuits), and should this Court on review of the case reach a conclusion opposite to that reached in the Court of Appeals for the Fourth Circuit, your petitioner would find itself in the position of having paid judgments which this Court had subsequently held to have been erroneously entered against it.

Your petitioner respectfully submits that the fact that the Government has selected its case and the cases against A. & P. and National Biscuit Company as "test cases," and has succeeded in having them determined first should

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* No appellate docket numbers have as yet been assigned to these cases, but their names and civil action numbers in the District Courts were as follows: Seventh Circuit cases (from the United States District Court for the Western District of Wisconsin): *Kraft Foods Company of Wisconsin and The Borden Company v. Commodity Credit Corporation*, No. 2820; *The Cudahy Packing Company v. Commodity Credit Corporation*, No. 2821; *Armour and Company and The Berst Corporation v. Commodity Credit Corporation*, No. 2822; *Safeway Stores, Incorporated v. Commodity Credit Corporation*, No. 2824; *H. J. Heinz Company v. Commodity Credit Corporation*, No. 2827; *L. D. Schreiber & Co., Inc. v. Commodity Credit Corporation*, No. 2830; *United States of America v. H. J. Heinz Company*, No. 2889; Eighth Circuit case (from the United States District Court for the District of Minnesota): *Land O'Lakes Creameries, Inc. v. Commodity Credit Corporation*, No. 5521.

not deprive petitioner of the right to urge as a ground for review any conflict of decisions among the Circuits which may hereafter arise. Nor does petitioner believe that it should be required to refund the sums paid to it in good faith by the Department of Agriculture until this Court has finally determined that the disputed transactions were not authorized by the Agricultural Act of 1949, or until all possibility of review of that question by this Court has been eliminated.

For these reasons petitioner prays this Court to vacate its order of October 13, 1958, and to hold its petition for a writ of certiorari *sub curia* pending the determination of the cases in the Seventh and Eighth Circuits and of any applications for review thereof which may be addressed to this Court.

Respectfully submitted,

DAVID R. OWEN,

10 Light Street (25th floor),
Baltimore 2, Maryland,

Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY, that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay (other than to the extent implicit in its request that the original petition be held *sub curia* as stated herein), and is restricted to grounds specified in Rule 58 of the Rules of this Court.

DAVID R. OWEN.

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SUPREME COURT, U.S.
FILED
NOV 6 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 271

NATIONAL BISCUIT COMPANY AND
THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

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Petitioners believe that the Courts of Appeals of the Seventh and Eighth Circuits may well reach a result contrary to that which the Court of Appeals for the Fourth Circuit reached in this case. In that event should the Government petition for certiorari and should the petition be granted (if for no other reason than to reconcile a conflict of decisions among the Circuits), and should this Court on review of the case reach a conclusion opposite to that reached in the Court of Appeals for the Fourth Circuit, your petitioners would find themselves in the position of having paid judgments which this Court had subsequently held to have been erroneously entered against them.

Your petitioners respectfully submit that the fact that the Government has selected their cases as "test cases," and has succeeded in having them determined first should not deprive petitioners of the right to urge as a ground for

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review any conflict of decisions among the Circuits which may hereafter arise. Nor do petitioners believe that they should be required to refund the sums paid to them in good faith by the Department of Agriculture until this Court has finally determined that the disputed transactions were not authorized by the Agricultural Act of 1949, or until all possibility of review of that question by this Court has been eliminated.

For these reasons petitioners pray this Court to vacate its order of October 13, 1958, and to hold their petitions for a writ of certiorari *sub curia* pending the determination of the cases in the Seventh and Eighth Circuits and of any applications for review thereof which may be addressed to this Court.

Respectfully submitted,

WILLIAM L. MARBURY,

JOHN MARTIN JONES, JR.,

Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY, that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay (other than to the extent implicit in our request that the original petition be held *sub curia* as stated herein), and is restricted to grounds specified in Rule 58 of the Rules of this Court.

WILLIAM L. MARBURY.